DOCUMENT RESUME

ED 282 327 EA 019 422

AUTHOR	Thomas, Stephen B.
TITLE	Health Related Legal Issues in Education.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE	87
NOTE	83p.; handling, prepaid; postage and handling will be added on billed
AVAILABLE FROM	Publication Sales, National Organization on Legal Problems of Education, 3601 S.W. 29th, Suite 223, Topeka, KS 66614 ($14.50 plus $1.50 postage and handling, prepaid; actual cost of postage and handling will be added on billed orders).
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Child Abuse; *Communicable Diseases; Compliance (Legal); Constitutional Law; Court Litigation; Disabilities; Due Process; Elementary Secondary Education; Equal Protection; Federal State Relationship; Government School Relationship; *Health; *Illegal Drug Use; Immunization Programs; *Pregnant Students; School District Autonomy; *School Law; School Personnel; School Responsibility; School Safety; Search and Seizure; Student Rights; Student School Relationship
IDENTIFIERS	*Education for All Handicapped Children Act; First Amendment; Fourteenth Amendment; Supreme Court

ABSTRACT

This monograph analyzes health and safety issues in education in terms of relevant constitutional and statutory provisions. Chapter 1, an introduction, summarizes Fourteenth Amendment equal protection and due process clauses and defines "handicapped" under the Rehabilitation Act. State assistance and student eligibility under the Education for All Handicapped Children Act (EHA) are explained. Chapter 2 presents a history of vaccines for contagious diseases, in a discussion of immunity, liability, and the state's role. Contagious diseases without vaccines are analyzed in chapter 3, which describes disease symptoms and adverse admissions and employment decisions. Diseases cited include Acquired Immune Deficiency Syndrome (AIDS), Crohn's disease, Hepatitis A and B, chicken pox, mononucleosis, etc. The EHA requires supportive services for handicapped children. Chapter 4 discusses case laws and EHA related services, including psychotherapy, nursing care, and climate control. Constitutional implications of drug testing are investigated in chapter 5, which reviews search standards and constitutional and statutory standards affecting school employees and students. Chapter 6 examines historical responses to child abuse and legal requirements concerning educators, as well as reporting mandates and immunity and liability. Chapter 7 discusses student pregnancy in terms of constitutional case laws (exclusion from school and from extracurricular activities, assignment to night programs, and sex education). A table of cases is appended. (CJH)

ED282327

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

HEALTH RELATED LEGAL ISSUES IN EDUCATION

STEPHEN B. THOMAS

EA 019 422

NOLPE
NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION

Health Related Legal Issues In Education

Stephen B. Thomas

NOLPE
NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION

Copyright© 1987
National Organization on Legal Problems of Education
Printed in U.S.A.

About the Author

Dr. Stephen B. Thomas graduated from the University of Florida in 1974, where he received his doctorate in educational administration while emphasizing school law and school finance within his program. Since that time he has taught at the university level and currently is serving as Professor of Education Law, College of Education, Kent State University.

In addition to teaching, Dr. Thomas has been a consultant to several state departments of education, national organizations, and school districts. He has presented papers at a variety of national and regional conferences, has published extensively, has conducted a number of funded research studies, and has edited several books and journals. Dr. Thomas is a member of the authors committee for *West's Education Law Reporter*, served as chairperson of the NOLPE publications committee during both 1985 and 1986, and now is serving as chairperson of the 1987 program committee. He is a member of the Board of Directors of NOLPE, editor of the *Yearbook of School Law* since 1985, and the author of *Legal Issues in Special Education.*

Contents

Chapter 1 Introduction 1
Fourteenth Amendment 1
Equal Protection 1
Due Process 4
Rehabilitation Act—Section 504 4
Education of the Handicapped Act (EHA) 5

Chapter 2 Vaccination 7
Immunity 7
Liability 8
Role of the State 10
Conclusion 15

Chapter 3 Disease 16
Acquired Immune Deficiency Syndrome (AIDS) 16
Chicken Pox 17
Crohn's Disease 18
Cytomegalovirus (CMV) 18
Hepatitis A & B 19
Herpes Simplex 1 & 2 19
Mononucleosis 20
Tuberculosis 21
Related Case Law 21
AIDS 22
Crohn's 24
Hepatitis B 24
Tuberculosis 26
Conclusion 26

Chapter 4 Health Related Services Under the EHA 31
Psychotherapy 32
Nursing Care 33
Medication Administration 33
Maintenance of Tracheotomy Tube 36
Catheterization 37
Climate Control 39
Conclusion 40

Chapter 5 Drug Testing 41
General Search Standards 41
Related Cases 44

Prisoners 45
Military Personnel 46
Public Employees 47
School Employees 48
Students 49
Conclusion 52
Justified at Inception 52
Related to Objective 53
Intrusiveness 53

Chapter 6 CHILD ABUSE 54
Definitions 56
Responsibility to Report 57
Immunity 58
Failure to Report 60
Policy 63
Conclusion 64

Chapter 7 STUDENT PREGNANCY 66
Case Law 67
Exclusion from School 67
Assignment to Night Programs 69
Exclusion from Extracurricular Activities 70
Sex Education 70
Conclusion 72

Table of Cases 73

Chapter I

Introduction

Health and safety-related problems are not new to American education. Over the years educators have had to deal with the vaccination of children, the spread of disease, the use of illegal drugs, the need for health services, the identification of abused children, and the involvement of pregnant students in mainstream programs and extracurricular activities, to name but a few. Administrators are aware of their responsibility to provide a safe environment within which students are to be instructed, and have had to make difficult decisions that often effect either constitutional or statutory rights. In addition to state health, abuse, discrimination, and education laws, related disputes often are based on the fourteenth amendment to the United States Constitution, section 504 of the Rehabilitation Act of 1973, or the Education of the Handicapped Act as amended in 1975 by Public Law 94-142. Because these three laws are applied in much of the case law identified and discussed in this publication, each merits further discussion at this time.[1]

Fourteenth Amendment

The fourteenth amendment states in part that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Because public schools are considered part of the "state" for fourteenth amendment purposes, public school educators are required to treat similarly all classes of persons and to provide adequate due process where liberty and property interests allegedly are denied.

Equal Protection

If a government policy or law *facially discriminates* against an individual on the basis of a *suspect classification* (e.g., alienage, race, nationality[2]) or affects a *fundamental right* (an explicit or implicit constitutional right—e.g., to assemble, to vote, to procreate[3]), such provisions will be *strictly scrutinized* by the courts and will be justified

---

1. The sections on fourteenth amendment, Rehabilitation Act, and EHA are based in part on another publication by the same author: Thomas, Legal Issues in Special Education (1985), at 6-15.

2. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality).

3. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972) (right to assemble); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

only if a *compelling interest* can be proven. This high level of scrutiny is based on the principle that certain actions must be subjected to close analysis in order to preserve equality and liberty. Although the compelling interest standard has at times been met,[4] scrutiny that is strict in theory generally is fatal in fact (i.e., the plaintiff generally will succeed in the complaint).[5]

If neither a suspect class nor a fundamental right is involved, the challenged act must bear only a *rational relationship* to a legitimate governmental objective. Under this minimum scrutiny standard, acts are invalid only if they are "clearly wrong, a display of arbitrary power, not an exercise of judgment."[6] Given the ease with which this standard generally is met, it has been proposed that minimum scrutiny in theory is virtually none in fact (i.e., the defendant generally will succeed in the complaint).[7]

In addition to the two extreme standards (strict scrutiny and rational relationship), the Supreme Court has established an *intermediate level of scrutiny* which requires (a) the classification to serve important governmental objectives, and (b) the discriminatory acts to be substantially related to the achievement of those objectives.[8] This standard is applied where mere rationality is too lenient and strict scrutiny is too demanding. A significant (though not necessarily fundamental) interest allegedly would be infringed, while a sensitive (though not necessarily suspect) class would be involved. Because the Burger Court was reluctant to increase the number of rights that are fundamental, or to identify additional classes that are suspect, the intermediate standard has been of particular importance to classes of persons who have sought protection from discriminatory practices (e.g., claims of sex and age discrimination have been evaluated under this middle tier).[9] Furthermore, the Rehnquist Court is likely to continue this reliance on the intermediate standard rather than expand the number of fundamental rights or suspect classes.

Education is not mentioned in the United States Constitution, nor is acquiring an education essential to involvement in rights that are guaranteed by the Constitution (e.g., neither education nor literacy is

---

4. Hirabayashi v. United States, 320 U.S. 81 (1943).

5. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972)

6. Mathews v. De Castro, 429 U.S. 181, 185 (1976).

7. Gunther, *supra* note 5, at 8 n.28.

8. Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Craig v. Boren, 429 U.S. 190, 197 (1976).

9. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

prerequisite to voting). As a result, education is not a fundamental right, but has been ruled both to be of "fundamental importance,"[10] and to qualify as a "property right" under state law. Given this reasoning, if a standard higher than rational relationship is to be applied in situations involving the right to an education, it would require that a suspect, or at least quasi-suspect, class exist. However, the Court has deviated from this position where students are denied free admission to public schools.[11]

Historically, numerous criteria have been proposed, both by the courts and by commentators, in determining qualification as a suspect class. Included among these indicia are that the identified class represents a discrete and insular minority;[12] evokes stereotypes that carry the stigma of inferiority and a badge of opprobrium;[13] possesses conditions that are immutable;[14] has been subjected to a history of purposeful unequal treatment;[15] is in a position of political powerlessness;[16] and is often saddled with physical, mental, or emotional disabilities.[17] Dependent upon the nature of a specific condition, a handicapped person may well meet each of these standards. Nevertheless, appellate courts and the vast majority of trial courts refuse to identify "handicapped persons" as a suspect class, and require only that the rational basis test be used to support facially discriminatory acts.[18] Similarly, abused children, pregnant students, students with diseases, students who refuse to be vaccinated, and students who use drugs fail to qualify as suspect classes.

In addition to the above, it should be noted that not all policies or laws facially discriminate; in fact, most are *facially neutral*, but may be applied or enforced in a discriminatory manner. In such situations, the plaintiff must prove that the discriminatory act was purposeful and that there was an intent to discriminate. Although it is not impossible to prove intent, it may prove exceedingly difficult in the majority of cases, even if actual discrimination exists.

---

10. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

11. The Supreme Court in Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982), in applying the intermediate standard in a case where neither a fundamental right nor a suspect class existed, did note, however, that a state need not justify by compelling necessity every variation in the manner in which education is provided to its population.

12. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

13. *See, e.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424 (1960).

14. *See, e.g.*, Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164 (1972).

15. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

16. *Id.*

17. *Id.*

18. *But see* Sterling v. Harris, 478 F. Supp. 1046, 1052-53 (N.D. Ill. 1979); Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975); *In re* G.H., 218 N.W.2d 441, 446-47 (N.D. 1974).

Due Process

The fourteenth amendment also requires that neither life, liberty, nor property may be withdrawn or withheld from an individual unless there is an adequate determination that the deprivation is justified. Where a due process violation is claimed, the courts determine whether the plaintiff had a liberty or property interest at stake; whether governmental action infringed such an interest; and whether adequate due process procedures were followed. The more significant the property or liberty interest, the "more process that is due."

Rehabilitation Act—Section 504

This federal statute states that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[19] Under the Act, the definition of *handicapped* is very broad and includes persons who have a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[20] A *physical or mental impairment* includes (a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[21] Also, *major life activities* include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[22] Accordingly, under the Act if a person has a physical or mental impairment that in fact limits a major life activity, that person qualifies as handicapped and must be afforded the protection provided by the Rehabilitation Act.

In addition to such persons who currently possess limiting impairments, the law also protects persons with records of impairment and persons who are regarded as having an impairment. For a person to *have a record of such an impairment*, the person must have a history of, or be misclassified as having, a mental or physical impairment that substan-

19. 29 U.S.C. § 794 (1983) (regulations are codified at 34 C.F.R. § 104 (1983)).
20. 34 C.F.R. § 104.3(j).
21. 34 C.F.R. § 104.3(j)(2)(i).
22. 34 C.F.R. § 104.3(j)(2)(ii).

tially limits one or more major life activities.[23] Furthermore, for a person to be *regarded as having an impairment*, that person (a) must have a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (b) must have a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (c) may have none of the impairments identified in this law, but is treated by a recipient as having such an impairment.[24]

In addition to the above, the law requires that the individual be a *qualified handicapped person*. With respect to education, a handicapped student would be qualified if (a) of an age during which nonhandicapped persons are provided such services, (b) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (c) a state is required to provide him with a free appropriate public education under the Education of the Handicapped Act. With respect to employment, a handicapped person is one who, with reasonable accommodation, can perform the essential functions of the job in question.[25] Such a person must be able to perform the job in spite of his handicap.[26] (To interpret the wording of the statute differently could require personnel decisions that are unreasonable. For example, a bus driver who had become blind may be qualified for the job in all ways except as to the limitations derived from his handicapping condition.) *Reasonable accommodation* may include making necessary facilities accessible and usable, restructuring work schedules, acquiring or modifying equipment, providing readers or interpreters, or similar actions.[27] Such adjustments may be required unless undue hardship results. *Undue hardship* is determined after a review of the size of the program, number of employees, type of facilities and operation, nature and cost of accommodation, and size of budget.[28]

Education of the Handicapped Act (EHA)

This law was revised in 1975 by Public Law 94-142, The Education for All Handicapped Children Act. That law represents a complete revision of part B of the EHA, and stipulates funding requirements. All states now receive assistance under the Act (New Mexico was the last state to receive assistance) and must be in compliance with the Act's provisions.

---

23. 34 C.F.R. § 104.3(j)(2)(iii).
24. 34 C.F.R. § 104.3(j)(2)(iv).
25. 34 C.F.R. § 104.3(k)(2).
26. Southeastern Community College v. Davis, 442 U.S. 397 (1979).
27. 34 C.F.R. § 104.12(b).
28. 34 C.F.R. § 104.12(c).

In meeting related requirements, recipients must identify, locate, and evaluate all resident handicapped children; develop an individual education program (IEP) for each handicapped child; establish procedural safeguards; and hold in confidence information and data used in evaluation and placement. Under the EHA, a free appropriate public education (FAPE) includes special education and related services that (a) are provided at public expense and are under public supervision and direction; (b) meet the standards of the state education agency; (c) include an appropriate preschool, elementary, or secondary education; and (d) conform with a child's IEP.[29]

To be classified as *handicapped*, and thereby be eligible for a FAPE as well as the procedural protection available under section 1415 of the Act, a child (ages three to twenty-one) must be mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or have a specific learning disability, *and*, by reason thereof, require special education and related services.[30] Accordingly, it is possible for a person to be handicapped, but not be in need of special education and related services and therefore not qualify as handicapped under this narrow definition.

Another definition under the EHA that is relevant to topics presented in this monograph is *other health impaired*. That term is defined in the federal regulations to include persons having limited strength, vitality, or alertness, due to chronic or acute health problems such as heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.[31]

In the remaining chapters of this monograph, the aforediscussed laws, as well as others, will be applied to controversies regarding vaccination, disease, health related services under the EHA, drug testing, child abuse, and student pregnancy.

---

29. 20 U.S.C. § 1401(18).
30. 20 U.S.C. § 1401(1).
31. 34 C.F.R. § 300.5(b)(7).

Chapter 2
Vaccination

The smallpox vaccine was in large part responsible for the annihilation of smallpox,[32] while other vaccines have drastically reduced the occurrence of several other contagious diseases (i.e., diseases that are spread from person to person). For example, in 1900 death rates (per 100,000 population) for tuberculosis (194.4), diphtheria (40.3), whooping cough (12.2), and measles (13.3) were significantly higher than were rates as recently as 1981—tuberculosis (.8); diptheria, whooping cough, and measles (less than .05 each).[33] Similar death and illness rates exist for other childhood diseases for which vaccines are available.

In spite of the overall success of vaccines, scattered public resistance and legal challenges at times arise. A few people oppose immunization on philosophic or religious grounds, while others fear that inoculation may physically injure their children. This chapter examines these law-related controversies following a brief discussion of immunity to disease.

Immunity

There are two ways a person can become immune to an infectious disease (i.e., a disease that enters the body and multiplies within): to develop natural immunity or to be vaccinated. To develop natural immunity, a person contracts the disease and, if the immune system is operating properly, develops antibodies to attack and destroy the disease-causing organisms. After fighting off this initial attack, the antibodies remain in the person's system and destroy infectious agents during future exposure prior to the manifestation of symptoms. Accordingly, in most circumstances a person would catch the same disease only once and be protected by natural immunity for the rest of his life.[34]

The second method used to become immune is vaccination. Such artificial immunity either can be temporary or permanent, depending on the nature of the vaccine (i.e., several vaccines need "boosters" if the body is to remain immune—for example, DPT and polio). The process of vaccination requires that a killed or weakened version of a disease-causing agent be introduced into the person's system, typically through intramuscular injection, with the major exception of the polio vaccine

---

32. American Medical Association, Family Medical Guide (Kunz ed. 1982), at 701.
33. United States Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970 (bicentennial ed. pt. 1 1975), at 58; United States Bureau of the Census, Statistical Abstract of the United States 1985 (105th ed. 1984), at 74.
34. American Medical Association, *supra* note 32, at 701.

which is taken orally. The person then develops antibodies to protect against the disease much the same way he would have produced them had he contracted the actual full-strength organisms.

Immunization can begin as early as two months of age and may continue until age fourteen to sixteen. (See Table 1.) Vaccinations do not begin prior to two months, because the immune system of many children would not be fully developed and therefore might not be able to produce antibodies to destroy even an attenuated version of the disease. Children typically are immunized for diphtheria, pertussis (whooping cough), and tetanus (DPT); polio; measles; mumps; and rubella (German measles). Also, new vaccines for chicken pox and haemophilus influenzae type b recently have been developed—the one for influenza already is in use,[35] while the one for chicken pox is in experimental use and may be marketed in the late 1980's. Furthermore, several other vaccines, including ones for pneumonia, typhoid fever, and hepatitis B, are available, but are given only in special circumstances.

Liability

Most children will have only a mild reaction to vaccination (e.g., brief loss of appetite, a lump at the site of the injection, mild fever) although a few may have more serious reactions which should be investigated by a physician. In some circumstances, children should not be vaccinated at all due to general health, immune system deficiency, or pregnancy. (For example, pregnant women should not be immunized for rubella.[36]) The person's physician is responsible for making the decision regarding the advisability of vaccination, as well as when it should occur.

In spite of the generally conscientious efforts of physicians, at times a child may suffer unforeseen consequences from inoculation. When injury is due to negligence in the administration of the vaccine, the physician may be sued under tort law, or, if the resulting problem is due to the vaccine itself, the pharmaceutical company that produced the product may be sued. In a recent case, the parents of Tyler White, a severely mentally retarded child, were awarded $2.1 million by a Cleveland Heights, Ohio jury which was convinced that the child's condition was linked to the pertussis component of the DPT—he was experiencing weekly seizures with the first occurring ten hours after his second DPT injection.[37] There is a severe reaction to the DPT in one of

---

35. The Immunization Practices Committee of the United States Public Health Service and the American Academy of Pediatrics recommend that children receive this vaccine at two years of age.

36. The Physicians' Manual for Patients (Subak-Sharpe ed. 1984), at 505.

37. This decision was reached in Cuyahoga County Common Pleas Court against Wyeth Laboratories, Inc. of Radnor, Pennsylvania. The pertussis vaccine was developed

Table 1

American Medical Association Schedule for Vaccinations

Age	Routine Vaccine	Method
2 months	DTP•	Injection
	Poliomyelitis	By mouth
4 months	DTP	Injection
	Poliomyelitis	By mouth
6 months	DTP	Injection
15 months	Measles Mumps German measles (rubella)	Injection
1¾ years	DTP	Injection
	Poliomyelitis	By mouth
4-6 years	DTP	Injection
	Poliomyelitis	By mouth
14-16 years	DT••	Injection

•DTP = Diphtheria, tetanus, and pertussis (whooping cough) vaccine

••DT = Diphtheria and tetanus vaccine

Source: Jeffrey R.M. Kunz, Editor-in-Chief
The American Medical Association, Family Medical Guide (1983), at 701.

every 6,000 children; some children have seizures, while a few develop handicapping conditions or even die. Tyler's parents proposed that the size of the jury verdict will result in a "safer vaccine." They felt it was a matter of cost-effectiveness. In actuality, all but two companies have withdrawn from the market, the cost of the product has escalated, and insurance companies no longer are willing to "share the risk" with DPT producing laboratories. (To "self-insure," the largest producer now has tripled the price of a vial—$171, $120 for product liability and $51 for the vaccine). Also, due in part to the success of the plaintiffs in the Cleveland Heights case, 100 additional suits have been filed. The result of such suits could be the total discontinuation of production, or an excessively high price. Many doctors fear that the current price level already is prohibitive to most poor families, given that related costs typically are out-of-pocket and that insurance generally does not reimburse for such expenses. However, some states provide free vaccination for children from families that are unable or unwilling to pay for the service—e.g., Ohio Rev. Code section 3313.671(B). Also, a growing lobby of concerned physicians and parents has requested Congress to assist pharmaceutical companies through co-insurance or to set limits on damage awards for suits involving vital vaccines. A related bill, H.R. 5546, was proposed in 1986. Its proponents argue that the bill will establish a fair system of compensation for the few children "unavoidably injured" by vaccines; will assure a safe, adequate, and affordable supply of vaccines for children; and will promote research for new and improved products. At the time of this writing, Congress has not as yet acted on this bill.

Role of the State

State legislatures have played an important role in the reduction of childhood diseases by requiring that children be vaccinated prior to being admitted to school. However, not all recommended vaccines are required in each state. (See Table 2.) For example, all states require vaccination for diphtheria, measles, rubella, and polio, but three states (Arizona, Missouri, New York) do not mandate that the tetanus vaccine be taken by school children, ten states (Arizona, Kentucky, Missouri, Montana, New York, Oregon, Pennsylvania, Rhode Island, Texas, Washington) do not require inoculation for whooping cough (pertussis), and seventeen states (Alaska, Arizona, Arkansas, Illinois, Iowa, Kentucky, Maryland, Mississippi, Missouri, Montana, Nevada, New Mexico,

---

in the mid-1930's and has been in widespread use since the late 1950's. The company noted that the vaccine is taken by millions of children each year with few severe side effects, but that on rare occasion can result in inflammation of the brain or nervous system. The company also argued that the infrequent severe reactions are "vastly offset" by the protection to the life and health of the other immunized children. Miller, *Jury Awards $2.1 Million in DPT Vaccine Case*, The Plain Dealer (Mar. 20, 1986), at 1.

Table 2

State Immunization Requirements
Applicable to Any or All of Grades K-12

State	Diphtheria	Tetanus	Pertussis	Measles	Mumps	Rubella	Polio
Alabama	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Alaska	K-12	K-12	K-6 yrs	K-12	Not Required	K-11 yrs	K-12
Arizona	K-12	Not Required	Not Required	K-12	Not Required	K-12	K-12
Arkansas	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
California	K-12	K-12	K-6 yrs	K-12	K-6 yrs	K-12	K-12
Colorado	K-12	K-12	K-6 yrs	K-12	K	K-6	K-12
Connecticut	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Delaware	K-12	K-12	K-6 yrs	K-12	K-6	K-12	K-12
Dist. of Col.	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Florida	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Georgia	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Hawaii	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Idaho	K-5	K-5	K-6 yrs	K-5	K-5	K-5	K-5
Illinois	K-12	K-12	K-5 yrs	K-12	Not Required	K-12	K-12
Indiana	K-12	K-12	K-6 yrs	K-12	K-1	K-12	K-12
Iowa	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
Kansas	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Kentucky	K-12	K-12	Not Required	K-12	Not Required	K-12	K-12
Louisiana	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers
Maine	K-12	K-12	K-6 yrs	K-12	K-6	K-12	K-12
Maryland	K-9	K-9	K-6 yrs	K-12	Not Required	K-9	K-9
Massachusetts	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Michigan	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers
Minnesota	K-12	K-12	K-6 yrs	K-12	K-6 yrs	K-12	K-12
Mississippi	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
Missouri	K-12	Not Required	Not Required	K-12	Not Required	K-12	K-12
Montana	K-12	K-12	Not Required	K-12	Not Required	K-12	K-12
Nebraska	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Nevada	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
New Hampshire	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers
New Jersey	K-12	K-12	K-6 yrs	K-12	K-12 yrs	K-12	K-12
New Mexico	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
New York	K-12	Not Required	Not Required	K-12	K-12	K-12	K-12
North Carolina	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
North Dakota	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Ohio	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Oklahoma	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
Oregon	K-12	K-12	Not Required	K-12	New Enterers	K-12	K-12
Pennsylvania	K-12	K-12	Not Required	K-12	K-12	K-12	K-12
Rhode Island	K-12	K-12	Not Required	K-12	K-6 yrs	K-12	K-12
South Carolina	K-12	K-12	K-5 yrs	K-12	Not Required	K-12	K-12
South Dakota	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Tennessee	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
Texas	K-12	K-12	Not Required	K-12	K-13 yrs	K-11 yrs	K-12
Utah	K-12	K-12	K-6 yrs	K-12	K-12	K-12	K-12
Vermont	K-12	K-12	K-6 yrs	K-12	Not Required	K-12	K-12
Virginia	K-12	K-12	K-6 yrs	K-12	New Enterers	K-12	K-12
Washington	K-12	K-12	Not Required	K-12	K-1	K-12	K-12
West Virginia	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers
Wisconsin	K-12	K-12	K-6 yrs	K-12	K-2	K-11 yrs	K-12
Wyoming	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers	New Enterers

Source: United States Department of Health & Human Services, "State Immunization Requirements 1985-1986" (1986), at 1.

North Carolina, Oklahoma, South Carolina, Tennessee, Vermont) do not require vaccination for mumps.

Immunization statutes obviously are within the power of state legislatures, while the vast majority of courts historically have upheld the delegation of the necessary authority to departments of health and to local school districts.[38] Related statutes and selected regulations can affect children attending both public or private schools,[39] or can affect children attending only public schools.[40] Also, immunization requirements generally have been upheld regardless of whether there was a clear danger of an epidemic,[41] or whether an epidemic already existed.[42] The United States Supreme Court examined related issues on two occasions. The first was in *Jacobson v. Massachusetts* (1905) where the right of the board of health to require residents to be vaccinated was upheld;[43] the second was in *Zucht v. King* (1922) where the right of school officials to refuse admission to unvaccinated students was upheld.[44]

Within the authority to require immunization, can be the authority to exempt selected persons for approved reasons, assuming of course that such exemptions do not otherwise violate federal or state constitutions. However, many legal controversies have resulted when children have sought exemption based on health, religious, philosophic, or "other good cause" reasons. Today, all fifty states permit school children to be exempt from mandatory immunization if a physician supports the claim that it is dangerous for the individual child. A medical opinion should follow an examination of the child and be based on the child's medical history and current condition, and not on the premise that no person is "a fit subject for vaccination."[45] Additionally, a school board may require that a physician's "certificate of unfitness" be submitted annually, given

---

38. Syska v. Montgomery County Bd. of Educ., 415 A.2d 301 (Md. Ct. Spec. App. 1980), *appeal dismissed*, 450 U.S. 961 (1981); Itz v. Penick, 493 S.W.2d 506 (Tex. 1973), *appeal dismissed*, 412 U.S. 925 (1973); McCartney v. Austin, 298 N.Y.S.2d 26 (N.Y. App. Div. 1969); Mosier v. Barren County Bd. of Health, 215 S.W.2d 967 (Ky. 1948); People v. Ekerold, 105 N.E. 670 (N.Y. 1914); Viemeister v. White, 72 N.E. 97 (N.Y. 1904); Blue v. Beach, 56 N.E. 89 (Ind. 1900); State v. Hay, 35 S.E. 459 (N.C. 1900); Morris v. Columbus, 30 S.E. 850 (Ga. 1898); Bissell v. Davison, 32 A. 348 (Conn. 1894); Duffield v. School Dist., 29 A. 742 (Penn. 1894); Abeel v. Clark, 24 P. 383 (Cal. 1890); Hazen v. Strong, 2 Bt. 427 (1830).

39. Mannis v. Arkansas, *ex rel.* Dewitt School Dist., 398 S.W.2d 206 (Ark. 1966) (where the court upheld a health regulation requiring vaccination of school children).

40. People v. McIlwain, 151 N.Y.S. 366 (Del. County Ct. 1915).

41. *In re* Elwell, 284 N.Y.S.2d 924 (N.Y. Fam. Ct. 1967); Mountain Lakes Bd. of Educ. v. Maas, 152 A.2d 394 (N.J. Super. Ct. App. Div. 1959), *aff'd*, 158 A.2d 330 (N.J. 1960).

42. Board of Trustees v. McMurtry, 184 S.W. 390 (Ky. 1916).

43. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

44. Zucht v. King, 260 U.S. 174 (1922).

45. Hammond v. Town of Hyde Park, 80 N.E. 650 (Mass. 1907).

46. Barber v. School Board, 135 A. 159 (N.H. 1926).

that the child's condition may change,[46] and that the certifying person be a medical doctor rather than a chiropractor.[47] (In the chiropractor case, the plaintiff had filed a petition for mandamus to require the superintendent to accept a chiropractor's certificate in lieu of immunization in order that plaintiff's children could attend school. The Supreme Court of Arkansas held that a chiropractor is not a physician within the meaning of state law and therefore did not have the authority to determine "physical disability" which would contraindicate vaccination.)

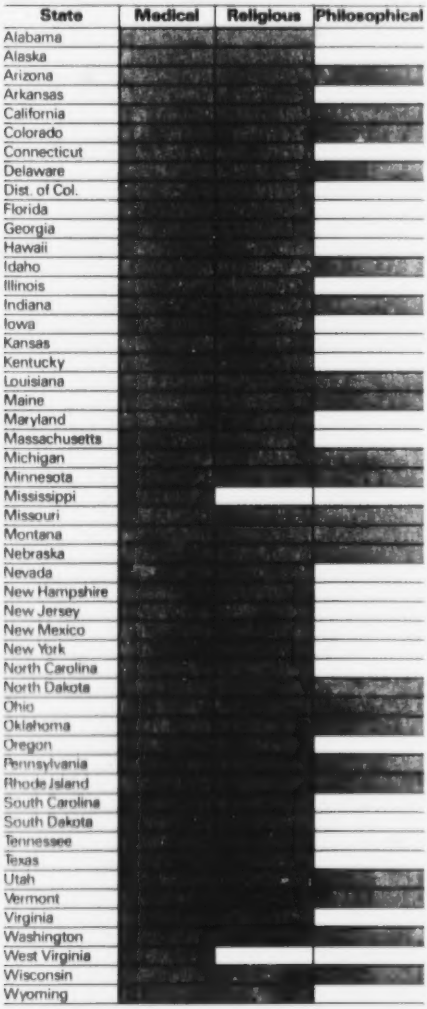
In addition to the medical exemption, forty-eight states exempt children with "free exercise of religion" claims (all except Mississippi and West Virginia), and twenty-two provide similar rights for persons with philosophic justifications (Arizona, California, Colorado, Delaware, Idaho, Indiana, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Washington, Wisconsin). (See Table 3.) Related challenges have centered around whether a religious exemption may be based on personal religious beliefs, rather than on regular attendance and good standing within a church whose membership professed such beliefs;[48] whether members of all organized religions had an equal opportunity to be considered for exemption;[49] whether a religious exemption could be provided without also establishing a philosophic exemption,[50] or whether requiring participants in interscholastic sports to take a tetanus shot infringed upon religious freedom.[51] In a related case from Ohio, plaintiffs objected to the immunization of their children on the basis of their belief in "chiropractic ethics," a body of thought which teaches that injection of foreign substances into the body is of no benefit and can only be harmful.[52] Ohio statute permits exemption to the immunization requirement where "good cause, including religious convictions," is supported in writing.[53] The parents completed the necessary paper work and pointed out that the exemption previously had been issued to students with strict religious claims. They failed to receive the exemption and filed suit. A federal district court judge ruled that the privacy rights of the children had not been violated, and that the grant of "good cause" exemptions to those with religious reasons did not make denial to plaintiff's children an equal protection

47. Heard v. Payne, 665 S.W.2d 865 (Ark. 1984).
48. Dalli v. Board of Educ., 267 N.E.2d 219 (Mass. 1971).
49. *See* Kolbeck v. Kramer, 202 A.2d 889 (N.J. Super. Ct. Law Div. 1964).
50. *See* Kleid v. Board of Educ., 406 F. Supp. 902 (W.D. Ky. 1976).
51. Calandra v. State College Area School Dist., 512 A.2d 809 (Pa. Commw. Ct. 1986).
52. Hanzel v. Arter, 625 F. Supp. 1259 (S.D. Ohio 1985).
53. Ohio Rev. Code § 3313.671(A)(3).
54. *See also* Brown v. Stone, 378 So. 2d 218 (Miss. 1980), *cert. denied*, 449 U.S. 887 (1980) (where religious exemption was held to violate the equal protection clause).

Table 3

Exemptions from Immunization Requirements (K-12)

■ Allowed ☐ Not Allowed



State	Medical	Religious	Philosophical
Alabama	■	■	
Alaska	■	■	
Arizona	■	■	■
Arkansas	■	■	
California	■	■	■
Colorado	■	■	■
Connecticut	■	■	
Delaware	■	■	■
Dist. of Col.	■	■	
Florida	■	■	
Georgia	■	■	
Hawaii	■	■	
Idaho	■	■	■
Illinois	■	■	
Indiana	■	■	■
Iowa	■	■	
Kansas	■	■	
Kentucky	■	■	
Louisiana	■	■	■
Maine	■	■	■
Maryland	■	■	
Massachusetts	■	■	
Michigan	■	■	■
Minnesota	■	■	■
Mississippi	■		
Missouri	■	■	■
Montana	■	■	■
Nebraska	■	■	■
Nevada	■	■	
New Hampshire	■	■	
New Jersey	■	■	
New Mexico	■	■	
New York	■	■	
North Carolina	■	■	
North Dakota	■	■	■
Ohio	■	■	■
Oklahoma	■	■	■
Oregon	■	■	
Pennsylvania	■	■	■
Rhode Island	■	■	■
South Carolina	■	■	
South Dakota	■	■	
Tennessee	■	■	
Texas	■	■	
Utah	■	■	■
Vermont	■	■	■
Virginia	■	■	
Washington	■	■	■
West Virginia	■		
Wisconsin	■	■	■
Wyoming	■	■	

Source: United States Department of Health & Human Services, "State Immunization Requirements 1985-1986" (1986), at 18.

violation, given that the rational basis test was met.[54]

Notwithstanding the above, where such exemptions exist and have been upheld, children were permitted to attend school without being immunized. However, if there existed a clear danger regarding a particular disease, several states would (a) remove unimmunized children from the classroom and provide them with some form of home instruction or tutorial work during the period of emergency, or (b) require those with religious and philosophic exemptions to be immunized and to attend regular classes if the emergency condition is to persist for an extended period. Ultimately, the options available to school districts would be determined by statute, or would have to be within a district's delegated authority.

Noncompliance with vaccination and attendance laws can result in a fine or even imprisonment, while in rare and extreme cases the child can be taken from the parents and placed in the care of a welfare agency.[55] In a 1982 case, the plaintiff challenged a Maryland statute permitting school officials to exempt children from required immunization if their parents were members or adherents of a recognized church or religious denomination which opposed immunization, but did not provide an exemption for persons who purported to have similar beliefs, but who did not belong to, or adhere to the tenets of, an organized church group.[56] The Court of Appeals of Maryland ruled that the exemption portion of the statute contravened the establishment clause of the first amendment, and thus held that, as written, no exemption may exist for any religious group, organized or not. The court concluded that the exemption provision of the statute was severable from the remainder of the statute and upheld the conviction of the plaintiff—he was found guilty of a misdemeanor and fined $50.

Conclusion

Future litigation involving vaccination will continue to center around exemption statutes and their enforcement as well as the liability issue. School districts or departments of health (dependent on state law) have had, and will continue to have, the authority to require that children be vaccinated if they are to attend school. Exceptions, if there are to be any, are derived from state law. In regard to liability, federal legislation may be enacted which will permit relief to children who are injured from inoculation, but which will eliminate or limit punitive damages. Many states also are proposing changes in state law to cap punitive damages and attorney fees.

---

55. Cude v. State, 377 S.W.2d 816 (Ark. 1964).
56. Davis v. State, 451 A.2d 107 (Md. 1982).

Chapter 3
Disease

It goes without saying that vaccines do not exist for all diseases and that all children have not taken those vaccines that do exist. Several vaccines are in the experimental stage (e.g., chicken pox), while others are not fully developed (e.g., cytomegalovirus). Furthermore, the origin of some diseases still is unknown (e.g., Crohn's), or is not fully understood (e.g., common cold). As a result, there will be times when students, staff, or educators contract a disease. Difficult decisions then have to be made regarding continued attendance or admission in the case of students, or continued employment in the case of employees. This chapter identifies selected diseases for which there are no vaccines and discusses the legal implications of adverse employment and admissions decisions.

Acquired Immune Deficiency Syndrome (AIDS)

AIDS (HTLV-3) was first recognized as a virus in 1979 and was established as a separate disease entity in 1981. It has no known vaccine or cure and results in severe and irreversible damage to the body's immune system and thereby causes the person to become vulnerable to a variety of uncommon infections, including a rare type of cancer (Kaposi's Sarcoma) and a rare type of pneumonia (Pneumocystis Carinii). Most of these infections would have been repelled if the immune system were operating properly. According to the Centers for Disease Control (CDC) in Atlanta, the disease has a high death rate—over 50% of those individuals with the disorder have died—and, as of January 13, 1986, has been responsible for the deaths of 16,458 persons.

There are no reported cases where the disease was transmitted through casual contact (e.g., coughing, sneezing, perspiration, food, public facilities). Experts believe that the virus is not air-borne (like colds), nor transmitted through fecal contamination of food (like hepatitis A), nor carried by insects (like malaria); rather, they believe that it is transmitted through the blood (like hepatitis B). Accordingly, blood or contaminated semen apparently must be passed directly into another person's blood system if the virus is to be transmitted.[57] (The

---

57. The AIDS virus also has been discovered in the saliva of victims, yet appears very uninfectious in that state. Researchers speculate that antibodies deactivate the virus in the saliva, so that it does not infect others. In support of this claim is the fact that there are no reported cases to date where either kissing or lesbian activities have resulted in transmission. *See* Centers for Disease Control, Morbidity and Mortality Weekly Report No. 34 (Aug. 30, 1985) at 517-21 for a related discussion.

virus also is present in other body fluids, saliva for example, but is in an attenuated condition and apparently is not transmissible in fluids other than blood or semen.)

Gay men, intravenous drug users, and hemophiliacs who receive blood transfusions represented the three "high risk" groups in the early to mid 1980's.[58] Gay men may contract the disease through anal intercourse, which often results in ruptures of the mucous membrane, while both drug users and hemophiliacs may have the virus transmitted directly into the blood stream. However, people receiving blood or blood products today have a much lower risk of contracting the virus, because there now is a test for the AIDS antibody and there soon will be a test for the actual virus which will help screen-out contaminated blood.[59] Accordingly, blood recipients no longer technically remain in the "high risk" category.

Symptoms. This disorder has a long incubation period, ranging from six months to two years, although it can vary beyond this range—possibly as long as ten years. The person generally will experience weight loss of more than ten pounds in less than two months; fever that has persisted more than a week; swollen glands; enlarged lymph nodes in the neck, armpit, or groin; night sweats that persist for several weeks; diarrhea or bloody stools; dry cough; blotches or bumps on or under the skin, inside the mouth, nose, eyelids, or rectum; fatigue; and white patches in the mouth.[60]

Chicken Pox

This infectious disease is caused by the herpes zoster virus (also termed varicella zoster) and chiefly affects the skin and the lining of the mouth and throat. It is both infectious and contagious. It generally is mild, when compared to other childhood diseases. A vaccine for chicken pox is now in experimental use with generally good results.

Symptoms. A child with chicken pox will have a skin rash, which later dries out, and a slight fever. Children often do not appear sick beyond their rash, and require only about seven-to-ten days to recuperate. Adults generally have a more severe reaction with flu-like symptoms and require more time for recovery.[61]

---

58. Experts no longer place Haitians on the high risk list, because all but a few proved to be homosexual, bisexual, or drug users, although they earlier had denied such accusations.
59. USA Today, April 14, 1986, at 4-D.
60. Ohio Dep't of Health, Some Facts About AIDS (1985).
61. American Medical Association, *supra* note 32, at 700.

Crohn's Disease

Crohn's disease is a chronic disease of unknown origin which is characterized by inflammation of the bowel. The bowel wall and supporting membrane swell, resulting in a narrowing of the intestinal lumen. Small bowel obstruction occurs in 25 to 30% of patients, while perianal disease occurs in approximately 80% of those infected.[62] In severe cases, surgery may be required. The disease can be disabling in cases where surgery often is needed or where recuperation time is lengthy.

Symptoms. A person with this disease generally will have a history of abdominal pain, diarrhea, and perianal disease; in addition, he also may complain of fever and weight loss.

Cytomegalovirus (CMV)

This virus is a member of the herpes group and is virtually unknown to the general public, although health care professionals are becoming increasingly familiar with its symptoms and potential danger. It is a common virus, but has not received much attention because it is harmless to most people. However, CMV can cause injury to the fetus of a woman who catches it for the first time during pregnancy. The virus may cause hearing loss, mental retardation (about 5,000 children born each year in the United States are mentally retarded as a result of CMV), or delays in development. It also is dangerous to adults who have a suppressed immunity, such as those who receive chemotherapy treatments for cancer or who undergo organ transplants, and to those with an immune deficiency disease (e.g., AIDS). However, if the body is capable of resisting CMV, antibodies will develop in the blood. The virus does not die, it simply goes dormant and remains in the cells of the body. It may at times reactivate but, in most situations, the reaction is so mild that the person may exhibit no symptoms.[63]

Cytomegalovirus is spread by contact with body secretions, including urine, saliva, feces, blood and blood products, semen, breast milk, respiratory secretions, and cervical secretions. The CDC has noted that because the risk to personnel, particularly women of childbearing age, is not fully known, it is important to inform them when infected children are present. Furthermore, the CDC recommends that care for any infant or child should include hygienic measures such as washing hands after contact with secretions, diapers, catheters, or other contaminated articles.[64]

---

62. For related information, *see* The Physicians' Manual for Patients, *supra* note 36, *passim*.
63. Gehrz, CMV: Diagnosis, Prevention and Treatment (1984), *passim*.
64. State of Ohio, Preventive Medicine Monthly 10, No. 2, Feb. 1985, at 1, 2.

Symptoms. Symptoms for CMV are similar to those for mononucleosis: fever, sore throat, fatigue, and swollen glands. Also, it may cause pneumonia, or enlargement of the liver or spleen.

Hepatitis A and B

Hepatitis A is a disease caused by a virus and was probably described by Hippocrates who used the term epidemic jaundice. This disease is transmitted via food, water, milk, clothing, eating utensils, and other objects contaminated by feces. Raw shellfish from sewage-contaminated water is a common source of the disease. Inadequate sewage disposal and unsanitary latrines also may contaminate water used for bathing or dish washing; also, dirty bathrooms and improperly laundered towels are possible sources of contamination. Hepatitis A is highly contagious, even before symptoms appear. Family members can be immunized against the disease for a short time by having gamma globulin injections. In a school setting, to require injections for an entire student body typically is impractical.

Hepatitis B, or serum hepatitis, is caused by a different virus and is more serious than is the A strain, but is not as easily spread. It is transmitted by contaminated blood or sexual contact (similar to how AIDS is transmitted). Ear piercing, tattooing, acupuncture, or any medical or dental procedure that cuts or punctures the skin can pass the virus. Cirrhosis of the liver can result in chronic cases.

Symptoms. Hepatitis A typically starts with intestinal flu-like symptoms: fever, headache, aching muscles, loss of appetite, nausea, and vomiting. These symptoms generally do not appear until two-to-six weeks after exposure to the virus, which travels through the blood stream and lodges in the liver. The patient may have swelling, tenderness, and sharp pain in the upper right abdomen. Bile formed by the liver backs up into the blood stream, causing the patient's skin and eye-whites to turn yellowish. The breath develops a sickly sweet odor, and the urine turns brown because abnormally high amounts of bile are being excreted through the kidneys.[65] The symptoms for hepatitis B are generally the same as for hepatitis A, but often last longer and are more severe.[66]

Herpes Simplex 1 and 2

Approximately 75% of the population is infected by the herpes simplex

---

65. The Physicians' Manual for Patients, *supra* note 36, at 181.
66. *Id.* at 182.

1 virus, generally first occurring early in childhood. This virus causes cold sores (fever blisters). While the blisters are present the virus is highly contagious, but it is not likely to be transmitted in the latent stage. Furthermore, the virus is not cured simply because the sores heal, although it does go dormant. Antibodies develop which make future occurrence less severe, but do not prevent recurrence. Recurrence is unpredictable, and can result from overexposure to sunlight, certain foods or drugs, and stress.

Herpes simplex 2 is a sexually transmitted virus and cannot be cured. It generally infects the genitalia, buttocks, and thighs with painful sores and blisters. It is the most common venereal disease in America today, affecting over twenty million persons. The disease is highly contagious through direct contact of infected areas; furthermore, recent studies have found that simplex 2 can survive for short periods on toilet seats, towels, and the like, although experts doubt that the disease is likely to be obtained from contact with such sources.

Symptoms. Usually before the blisters caused by simplex 1 appear, there is a burning or itching sensation. A few days after the sores erupt, the blisters enlarge, burst, and begin to dry out. They usually heal on their own within two-to-three weeks and seldom leave a scar. A major concern with simplex 1 is that the virus may be transmitted to the eye and cause ulceration of the cornea or blindness.[67] In young children, the primary infection often goes unnoticed, although it can result in a loss of appetite, fever, and considerable ulceration in the mouth; in adults the disease may result in severe illness if a primary infection occurs. In a school setting, children should be instructed as to proper hygiene in order to prevent transfer to the carrier's eyes or to other persons.

Persons with herpes simplex 2 will have an itching or tingling sensation in the genitalia, followed by the eruption of sores or blisters. In the first attack, the sores customarily appear two days to two weeks after exposure and last two-to-three weeks. Subsequent attacks, which may occur in a few weeks or not for years, generally last about five days and are less severe. Fever, malaise, and headaches may accompany the outbreak.[68] In severe cases, the virus can go to the brain and cause a serious form of encephalitis or go to the eye and result in blindness. As with herpes simplex 1, school children should be instructed as to proper hygiene and be directed to cover all exposed sores.

Mononucleosis

Mononucleosis is caused by the Epstein-Barr virus, an organism in the

67. *Id.* at 365.
68. *Id.* at 370-71.

herpes-virus group. Nearly 85% of preadolescents have been infected. For young children, the disease can be so mild that it is mistaken for a cold, but, for late teens or adults, it can be serious. When the virus enters the body, it causes changes in a category of disease-fighting white blood cells known as B lymphocytes. These cells are crucial in fighting infection. In a small percentage of cases, liver involvement may be considerable and jaundice may occur; furthermore, the person may have an enlarged spleen or prolonged fever. This disease should be of particular concern to educators, because it is spread by oral contact (the kissing disease).

Symptoms. One-to-two weeks following exposure the lymph nodes in the neck (or possibly armpit or groin) become swollen and sore. The patient may experience aching joints, fever, sore throat, difficulty in swallowing, fatigue, or skin rash. Because the symptoms may not be very specific, accurate diagnosis usually requires a blood test that confirms the high level and irregular appearance of B lymphocytes.[69]

Tuberculosis

Tuberculosis, the "white plague of the nineteenth century," is a reportable, communicable, infectious, inflammatory, acute or chronic disease that may occur in almost any part of the body. Pulmonary infection is the most common, although tuberculosis can spread to any other organ through the blood stream and lymphatics. The disease can occur by inhalation (most common) of the tubercle bacilli; ingestion (rare because of the pasteurization of milk and tuberculin skin testing programs for cattle); or direct infection (e.g., through a cut in the skin or mucous membrane). Tubercle bacilli are present in the air as a result of coughing, sneezing, and expectorating by infected persons; accordingly, tuberculosis is essentially an air-borne infection. Primary tuberculosis infections often are not recognized because they usually are asymptomatic; however, secondary infections can be more severe.

Symptoms. Symptoms can include coughing, sputum production, fatigue, night sweats, irritability, rapid pulse rate, low-grade fever, weight loss, vomiting, anorexia, indigestion, and pallor.[70] (See Table 4 at the end of this chapter for a list of communicable diseases and control measures.)

Related Case Law

The remaining portion of this chapter provides a discussion on recent case law dealing with "disease" in public schools. These cases typically are based on the fourteenth amendment, the Rehabilitation Act, or the

69. *Id.* at 383-84.
70. American Medical Association, *supra* note 32, at 703.

Education of the Handicapped Act, each of which is discussed in some detail in Chapter 1.

AIDS

Perhaps the most publicized impartial hearing officer decision (*In re* Ryan White) and resulting lower state court ruling in recent years involved the case of Ryan White, an Indiana boy with hemophilia who had contracted AIDS through a blood transfusion and later was denied admission to public school. A homebound program was prepared for him that included audio and video communications and a tutor. However, plaintiff's mother wanted him to be able to attend public school notwithstanding the increased probability of him contracting other diseases due to his immune deficiency. In spite of repeated requests, admission initially was denied, while school officials reasoned that the "risk was too great." Health officials disagreed, as did the impartial hearing officer who held that Ryan's current homebound placement was inappropriate because it was not "least restrictive," given his ability to perform in a mainstream setting, and the fact that his presence did not represent a danger to others. Accordingly, the hearing officer ordered that Ryan be admitted to regular classrooms when his health allowed, and be provided homebound education during the times when he was unable to attend. Based on this decision, the plaintiff again was admitted to school, only to be excluded through court order by the end of his first day. That court order kept Ryan out of school for over one and one-half additional months when a state circuit judge threw out the previous order thereby permitting the plaintiff once again to attend school.[71]

In a second related case, *District 27 Community School Board v. Board of Education*, an effort was made to acquire a temporary restraining order prohibiting education officials and the health commissioner from admitting children with AIDS to public schools which were not specially designed to accommodate the needs of such individuals.[72] The policy in existence in New York City schools stated that children with AIDS would not be automatically excluded, but would be reviewed on a case-by-case basis to determine whether their health and development permitted them to attend school in an unrestricted setting. Pursuant to this policy, the Commissioner of Health, following an individualized evaluation of a seven year old child (John/Jane Doe),

---

71. *In re* Ryan White, 507 EHLR 239.

72. District 27 Community School Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

recommended that the mainstream placement be continued. The state trial court (Supreme Court) agreed with the Commissioner and refused to issue the injunction to prohibit the preferred placement and argued that to automatically exclude children with AIDS from public schools would violate their rights under both the Rehabilitation Act and the equal protection clause. Furthermore, it should be observed that the court concluded that a person with AIDS clearly is physically impaired, as defined under the Rehabilitation Act, given that the virus destroys certain lymphocytes; and that such a person also may be handicapped under the EHA if his condition deteriorates to the point of needing special education and related services.[73]

In a final AIDS-related case, *Board of Education v. Cooperman*, state policy guidelines for the admission to school of children with AIDS/ARC and HTLV-3 antibodies were challenged by two local boards of education.[74] The guidelines required the admission of such children unless the following exceptional conditions were evident: (a) the student was not toilet trained or was incontinent, or otherwise was unable to control drooling; and (b) the student was unusually physically aggressive, with a documented history of biting or harming others.[75] However, the court ruled null and void the state regulations which had not been adopted in compliance with statutory rule-making procedures; required the Commissioner of Education to provide the school boards with a hearing at which time witnesses and evidence might be examined; and concluded that there existed sufficient evidence of a "potential risk of exposure" to warrant immediate hearings prior to admission for each of the involved children.

The procedural questions addressed by the court appear routine and there is little doubt that the Commissioner had not followed proper channels in promulgating the original guidelines. Accordingly, that part of the decision is uncontroversial. However, that portion that identified a "risk to exposure" appears unrelated to all of the evidence examined by the court. No written material or oral testimony supported the court's position. In dissent, Judge Gaulkin also identified a dearth of evidence to substantiate the majority opinion and concluded that "[t]he [b]oards have made no showing at all, much less a sufficient one, to justify the continued infringement of the constitutional rights of these children. On this record, to bar the children from school until 'appropriate procedural requirements' . . . are satisfied is to turn due process on its head."[76]

---

73. *Id.* at 339.
74. Board of Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986).
75. *Id.* at 257-58.
76. *Id.* at 279 (Gaulkin, J., concurring in part and dissenting in part).

Crohn's

In *County of Los Angeles v. Kling*, an applicant for admission to a nursing school filed suit alleging that she had been discriminated against on the basis of her handicap—Crohn's disease. The district court disagreed with appellee's assertions, and concluded that she was properly denied admission due to academic deficiencies. On appeal, the Ninth Circuit Court of Appeals reversed and ruled that Kling was an otherwise qualified handicapped individual within the meaning of the Rehabilitation Act and that she was denied admission to school solely due to her handicap.[77] The court noted that the physician had assumed that because of Crohn's disease Kling would be unable to complete the school's program, but that he had not evaluated her on an individual basis. Furthermore, the physician had testified that if he had known more about the appellee's medical history he would have "swayed very strongly toward acceptance." The court then concluded that it was "precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid."[78] The case then was appealed to the Supreme Court.

In a seven-to-two ruling, the Supreme Court reversed the circuit court decision without comment.[79] Justices Stevens and Marshall dissented from the summary disposition. Stevens noted that the Court's decision presumably "is not based on a view that the [c]ourt of [a]ppeals misapprehended the governing standard. . . . Apparently, the Court disagrees with the Ninth Circuit's application of that standard. However, the Court's reversal is not accompanied by a review of the [d]istrict [c]ourt's factual findings or a determination that they are not, in fact, 'clearly erroneous.'"[80] As a result of this decision, lower courts will be left to speculate as to the inclusion of persons with Crohn's disease under the Rehabilitation Act. However, Justice Steven's comments suggest that the plaintiff apparently qualified as handicapped, but was refused admission due to academic deficiencies, rather than due to handicap. Such a conclusion is only conjecture, given that it is based on a dissenting opinion, and given that no majority rationale was offered.

Hepatitis B

In *New York Association for Retarded Children v. Carey*, mentally

77. County of Los Angeles v. Kling, 769 F.2d 532 (9th Cir. 1985).
78. *Id.* at 534.
79. County of Los Angeles v. Kling, 106 S. Ct. 300 (1985) (mem.).
80. *Id.* at 301.

retarded children with hepatitis B were excluded from school by the board of education, although the Department of Health had recommended that they be isolated within their respective schools.[81] An injunction was issued to prevent the exclusion. As a result, numerous handicapped carriers were admitted, but most were assigned to new classes, teachers, or schools. No effort was made to isolate or reassign hepatitis B children who were not mentally retarded. School district officials argued that the exclusion of nonhandicapped children was unnecessary because their behavior was not likely to result in the transmission of the disease (i.e., they were not prone to bite; they had control of body fluids). In resolving this dispute, the district court ruled that with simple prophylactic and classroom management measures the presence of the children did not represent a substantial risk to others, and that by excluding only the handicapped children, the district had violated section 504, the EHA, the equal protection and due process clauses of the fourteenth amendment, and a prior consent judgment.[82] On appeal, the Second Circuit Court of Appeals upheld the lower court's judgment. The appeals court concluded that the children met the statutory definition of handicapped because they were mentally retarded, but did not address whether being hepatitis B carriers alone would have qualified them as handicapped.

In a second recent case, *Community High School District 155 v. Denz*, the plaintiff was a trainable mentally handicapped child with Downs Syndrome who also was a carrier of hepatitis B.[83] Furthermore, she repeatedly tested positive for an "e antigen," indicating that her infectivity was much greater than most other carriers. Nevertheless, the plaintiff requested a change of placement from a homebound program to the local special education school. The district denied the request and argued that she posed too great a risk to others; furthermore, district administrators proposed that the least restrictive and most beneficial placement for the plaintiff, given her medical condition, was in the home. The hearing officer disagreed and ordered the requested placement, which required that a teacher aide be assigned to guard against the infection of other children or staff. On appeal, the state superintendent of education, after hearing additional medical evidence and testimony, upheld the hearing officer's decision; on further appeal, the superintendent's ruling was upheld by a trial court. During the hearings, three doctors testified as to the difficulty of transmitting

81. New York Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979).
82. New York Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978).
83. Community High School Dist. 155 v. Denz, 463 N.E.2d 998 (Ill. App. Ct. 1984).

hepatitis B and as to the advantage of proper hygiene. It was noted that transmission requires that highly contagious fluid be in extremely close proximity to an open wound on the skin or to a mucous membrane, and that even then transmission most often does not occur. Given the above, the Appellate Court of Illinois Second District upheld the lower court decision.

Tuberculosis

In *Arline v. School Board*, a teacher with thirteen years of experience in a Florida school district had her contract terminated following three relapses of tuberculosis.[84] After being denied relief in state administrative proceedings, the teacher sought federal court review, asserting that her susceptibility to the disease made her a handicapped individual within the meaning of the Rehabilitation Act and that her dismissal violated section 504. The teacher contended that her handicap created no barrier to continued employment because the risk that she would infect others was minimal. In the alternative, she urged that even if discrimination on the basis of her handicap was a necessary qualification for employment, the school district should have offered a reasonable accommodation by assigning her to a teaching or administrative position working with persons "less susceptible to the disease."

The circuit court concluded that the plaintiff was a handicapped person as that term is defined under the Act, and then remanded the case to determine (a) whether the risks of infection precluded the plaintiff from being "otherwise qualified" for her job and, if not, (b) whether it was possible to make some reasonable accommodation for her continued employment. In peroration, the court noted that the law recognized that not every handicapped person can be integrated into every aspect of society, and that the applicability of section 504 then was limited to situations where handicapped persons are shown to be "otherwise qualified" if given "reasonable accommodation."[85] The circuit court decision was upheld by the Supreme Court.

Conclusion

Case law to date indicates that students who are physically or mentally impaired due to contagious disease may qualify as handicapped under section 504; employees who are similarly impaired also may qualify as handicapped if they can demonstrate that they are

84. Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987).
85. *Id.* at 764; *see also* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

otherwise qualified. Additionally, students with contagious diseases also may qualify as handicapped under the EHA if the disease impairs their ability to learn in the classroom. The primary question left unanswered is whether a person who has a disease, but is not impaired by it, qualifies under section 504—the Department of Justice stated that such individuals are not protected by federal statute; selected trial courts and commentators have disagreed.

Table 4

Classroom Communicable Disease Chart

Disease	Incubation Period	Symptoms of Illness	Communicable Period	Control Measures
Chickenpox	2 to 3 weeks	Fever. Skin eruption.	For up to 5 days before eruption until vesicles dry.	Exclude. Disease considered mild, sometimes confused with more serious disease. No exclusion of contacts. Alert parents of immune-suppressed child of exposure.
Conjunctivitis (Pink eye)	24-72 hours	Redness of white of eye, tearing, discharge of pus.	Until redness has disappeared.	Exclude until eye is comfortable. Urge medical care. No exclusion of contacts.
Coryza (Common Cold)	12 to 72 hours	Nasal discharge, soreness of throat.	One day before symptoms and usually continuing for about 5 days.	Not necessary to exclude. Urge bed rest. No exclusion of contacts.
Cytomegalo-virus (CMV)	3-8 weeks	Variable in school-aged children from asymptomatic to mononucleosis-like illness.	As long as shedding virus in saliva or urine-months or years following primary infection.	Exclusion of asymptomatic child unnecessary. Good personal hygiene, avoid contact with pregnant women and immune-suppressed persons.
Diphtheria	2 to 5 days	Fever, sore throat, often gray membrane in nose or throat.	Usually 2 weeks or less.	Exclude cases. No exclusion of contacts. Report immediately by telephone all cases to local and state health departments. Immunization is required.
Enterobiasis (Pinworm, Threadworm, Seatworm)	Life cycle about 3 to 6 weeks	Irritation around anal region. Visible in stool.	Usually 2 to 8 weeks.	Exclude until treated. Cleanliness with handwashing essential. No exclusion of contacts.
Fifth Disease	Estimated at 6-14 days	Minimal symptoms with intense red "slapped cheek" appearing rash; lace-like rash on body.	Unknown.	Exclude but may return with rash upon physician recommendation.
Hepatitis A	15-50 days, average 28-30 days	Fever, nausea, loss of appetite, abdominal discomfort and jaundice.	Two weeks before jaundice until about 7 days after onset of jaundice.	Rest, good personal hygiene, especially hand washing and enteric precautions; gamma globin shots prevent disease after exposure, but within two weeks; to family contacts only.

Disease	Incubation Period	Symptoms of Illness	Communicable Period	Control Measures
Herpes Simplex (Type 1)	3-12 days	Onset as clear vesicle, later purulent. Following rupture, scabs and in 1-2 weeks, heals. Commonly about lips and in mouth.	For a few weeks after appearance of vesicle.	Exclusion unnecessary. Avoid contact with immune-suppressed or eczematous persons. Good personal hygiene, avoid sharing toilet articles.
Impetigo	4-10 days	Running, open sores with slight marginal redness.	Spread by direct physical contact with untreated case.	Exclude until lesions brought under treatment. Good personal hygiene is essential. Avoid common use of toilet articles. No exclusion of contacts.
Influenza	24 to 72 hours	Fever and chills, often back or leg aches, sore throat, nasal discharge and cough; prostration.	A brief period before symptoms until about a week thereafter.	Exclude for duration of illness. Avoid personal contact. No exclusion of contacts.
Meningitis (Bacterial)	2 to 10 days-usually 3 or 4 days	Sudden onset of fever. Intense headache, nausea, often vomiting, stiff neck, delirium or petechial rash, shock.	Variable.	Early physician care urgent. Recommend giving intimate contacts chemoprophylaxis. Immunization for certain serotypes under certain circumstances. No exclusion of contacts.
Measles (Rubeola)	10-14 days	Begins like a cold; fever, blotchy rash, red eyes, hacking frequent cough.	3-4 days before rash until 4 days after rash onset.	Report immediately by telephone, all cases to local and state health departments. Immunization required. Exclude cases and non-immunized.
Mumps (Epidemic Parotitis)	2-3 weeks	20-40% of those infected do not appear ill or have swelling. 60-70% have swelling with pain above angle of lower jaw on one or both sides.	About 7 days before gland swelling until 9 days after onset of swelling or until swelling has subsided.	Exclude cases. Immunization required.
Pediculosis (Head or body lice)	Eggs of lice hatch in about a week; maturity in about 2-3 weeks.	Itching; infestation of hair and/or clothing with insects and nits (lice eggs).	White lice remain alive and until eggs in hair and clothing have been destroyed. Direct and indirect contact with infested persons and/or clothing required.	Exclude until treatment is started. Specific treatment usually lindane or pyrethrin shampoo and nit comb. Consult physician if necessary. Contact Health Department for outbreak control recommendations. Notify close contacts.

Disease	Incubation Period	Symptoms of Illness	Communicable Period	Control Measures
Pertussis (Whooping Cough. Rare in school-age children)	7 days-usually within 10 days	Irritating cough-symptoms of common cold usually followed by typical whoop in cough in 2-3 weeks.	About 7 days after exposure to 3 weeks after typical cough to fourth week of illness. When treated with erythromycin, 5-7 days after onset of therapy.	Report immediately by telephone all cases to local and state health departments. Immunization is required. Exclude cases.
Poliomyelitis (Infantile Paralysis)	3-35 days; 7-14 days for paralytic cases	Fever, sore throat malaise, headache, stiffness of neck or back, muscle soreness.	Not accurately known. May be as early as 36 hours after infection; most infectious during first few days after onset of symptoms.	Report immediately by telephone all cases to local and state health departments. Immunization is required. Exclude cases.
Ringworm (Tinea Infections)	10-14 days	Scaly patches of baldness of scalp; brittle and falling hair; usually oval shaped lesions.	As long as infectious lesions are present, especially when untreated.	Exclude until treatment begun. Good sanitation should be practiced. Do not share toilet articles. No restriction of contacts.
Rubella (German (Measles)	14-21 days	Slight general malaise; scattered measles-like rash; duration of approximately 3 days.	About one week before rash until rash has disappeared.	Report immediately by telephone all cases to local and state health departments. Immunization required. Exclude cases. Disease presents risk to unborn child during first 3 months of pregnancy.
Scabies	Infection caused by almost invisible mite. Lesions symptomatic after 4-6 weeks.	Severe itching; lesions around loose fleshy tissue (e.g., finger webs, elbows, crotch, etc.)	Until mites and eggs destroyed.	Consult physician. Exclude child for 24 hours after specific treatment is started. Cleanliness is essential. No restriction of contacts.
Streptococcal Infection (Scarlet Fever, Scarlatina, Strep Throat)	1 to 3 days	Sore throat, fever, headache. Rough rash 12-48 hours later.	Until 48 hours after treatment begun.	Exclude until clinical recovery. Urge early medical care. Usually requires 10 days of antibiotic treatment. No restriction of contacts.çScreening culture for asymptomatic cases not recommended.
Tuberculosis Pulmonary	Highly variable-depends on age, life style, immune status. Primary: 4-12 weeks. Latent: 1-2 years after infection; lifelong risk.	Weakness, cough, production of purulent sputum, loss of weight, fever. Urinary tract symptoms if this system involved.	Until sputum is free from tuberculosis bacteria. Generally after a few weeks of effective treatment.	Exclude and urge respiratory isolation of patient with physician's care. Cover cough. Skin test contacts. Chemoprophylaxis with INH of positive (in absence of disease). No restriction of contacts. Isolation of nonpulmonary tuberculosis unnecessary.

Source: Health Services in Nebraska Schools—Policies and Procedures (1985), at 39-43.

Chapter 4

Health Related Services Under the EHA

Related services under the Education of the Handicapped Act (EHA) include transportation and developmental, corrective, and other supportive services that are required to assist a handicapped child to benefit from special education. According to federal statute, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes qualify as related services.[86] Furthermore, according to federal regulations related services also includes school health services, social work services in schools, and parent counseling and training.[87] Medical services is defined as those services provided by a licensed physician to determine a child's mentally handicapping conditions which result in the child's need for special education and related services.[88] On the other hand, school health services is defined as those services provided by a qualified school nurse or other qualified person.[89] Given the above, for a child to be eligible for a particular related service the child must be handicapped as defined under the EHA,[90] the service must be necessary for the child to benefit from his education, and the service must be provided by a qualified school nurse or other qualified person.

Since 1975 the number of related services available to handicapped children has increased significantly. This expansion has been due either to school district acquiescence or to judicial imposition. Both state and federal courts have reviewed related disputes, while two such cases have been decided by the Supreme Court—*Board of Education v. Rowley* (where a child was denied a sign language interpreter because her program without the interpreter was designed to meet her individual educational needs and because she already was incurring "some educational benefit")[91] and *Irving Independent School District v. Tatro*

---

86. 20 U.S.C. § 1401(17).
87. CFR § 300.13(a).
88. CFR § 300.13(b)(4).
89. CFR § 300.13(b)(10).
90. 20 USC § 1401(1). The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.
91. Board of Educ. v. Rowley, 458 U.S. 176 (1982).

(where a school district was ordered to provide clean intermittent catheterization services to a child with spina bifida).[92] Among the cases involving related services are several that deal with medical or health services such as psychotherapy, nursing care, medication administration, maintenance of tracheotomy tube, catheterization, and climate control.

Psychotherapy

In determining whether a particular service qualifies as a related service, the courts generally examine both the nature of the service, and the qualifications of the provider. These issues were discussed in a recent federal district court case involving psychotherapy, *Max M. v. Illinois State Board of Education.*[93] In that case, the student at private expense received psychotherapy from a psychiatrist and later requested reimbursement. Intensive psychotherapy was found to be essential to the development of an appropriate program for Max M., but the district had failed to incorporate such services into his IEP. The court ruled that the parents were entitled to recover the sums expended, even though the services were provided by a psychiatrist rather than a psychologist. In rendering its decision, the court reasoned that the nature of the service, rather than the credential of the provider, was the touchstone. Accordingly, since psychotherapy qualifies as a related service, reimbursement cannot otherwise be denied simply because the service was provided by a person with a medical degree. However, the court further ruled that the amount of reimbursement could have been limited to an amount a qualified nonmedical district employee would have charged had the district provided such a service.[94] But, since the district provided no such figures for which the court could determine the appropriate amount of relief, the total fee was awarded to plaintiff in this instance.

In addition to *Max M.*, numerous other cases have dealt with the appropriateness of psychiatric services and psychotherapy within IEPs. In these cases, the various courts ruled that a public school was not required to fund an emotionally handicapped child's hospitalization at a private psychiatric hospital as a related service to special education;[95] that psychotherapy as provided by a nonphysician qualified as a health service even though it was supervised by a psychiatrist;[96] that psychological services that were required to assist an emotionally disturbed student

92. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).
93. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).
94. *Id.* at 1519.
95. McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983). *See also* Darlene L. v. Illinois State Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983).
96. T.G. v. Board of Educ., 576 F. Supp. 420 (D.N.J. 1983), *aff'd*, 738 F.2d 425 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 592 (1984).

to benefit from special education were related services and must be provided without cost to the parents;[97] and that psychotherapy provided to an emotionally disturbed child who was placed in a residential setting pursuant to his IEP was a related service despite the fact that the state board of education had promulgated regulations which considered psychiatric therapy to be outside the definition of related services.[98]

Nursing Care

The principles established in *Max M.* were similar to those that surfaced in a case concerning nursing services, *Detsel v. Board of Education.*[99] In this case, the severely physically disabled plaintiff required extensive care, including the administration of medication through a tube to the child's jejunum; "P, D, and C" which calls for ingesting saline solution into the lungs, striking of the child about her lungs for four minutes, and suctioning of mucus from the lungs; the ability to perform cardio-pulmonary resuscitation because of complications arising from a tracheotomy; and the ability to deal with respiratory distress, which was described as a life-threatening condition by the child's doctor. Such services can be provided by a licensed practical nurse (LPN) or a registered nurse, but not a school nurse. After a review of both congressional intent in enacting the EHA and the nature of the requested services, the court ruled that the therapeutic health services sought by the plaintiff more closely resembled the medical services specifically excluded by the Act. The court reasoned that even though the requested services did not fulfill the "physician" requirements set forth by law, the exclusion of the disputed services was in keeping with its spirit. Accordingly, as in *Max M.* the key issue was the nature of the service rather than the credentials of the provider.

Medication Administration

Over the years, medication administration at school has become increasingly common. This is due not only to the growing number of students in need of medication during school hours, but also to the rights of children under federal statute. Also, medication generally can be provided by a school nurse or other trained individual and as a result qualifies as a health service under the EHA. Given the above, the vast majority of school districts today are involved either in the administration of medication, or in the supervision of self administration. The number

97. Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981).
98. *In re* A Family, 602 P.2d 157 (Mont. 1979).
99. Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986).

of potential health and legal disputes appears almost endless in this evolving area. However, many of these potential problems can be avoided if proper procedures are followed.

Perhaps the best way to avoid both injury and litigation is to refuse to administer medication during the school day. This is not possible for those handicapped children that are in need of such service during school hours, but is possible for many children who could be medicated at other times. The Supreme Court made this position clear in its *Tatro* decision when it stated that

> only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or lay person could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.[100]

Although educators may administer medication, they may not medically diagnose ailment or prescribe treatment, even if the medication is nonprescription (e.g., aspirin, antacid, vitamins).[101] Furthermore, written authorizations from both the parent and the physician must be signed and on file, even if the medication is to be self administered. Parental consent is necessary given that minors are involved,[102] while an authorization from the physician is needed in order to verify that the medication has in fact been prescribed. If possible, the physician's authorization should include a description of the probable reactions to the medication, side effects, and emergency treatment. Note that although these signed authorizations permit the issuance or administration of medication, they in no way protect school personnel from liability if a child is injured due to a lack of proper supervision or an error in administration (e.g., administration of the wrong drug or quantity).[103]

---

100. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

101. *But see* People v. Shokunbi, 232 N.E.2d 228 (Ill. App. Ct. 1967) (where the court held that the defendant's reply that he was a metaphysician and that he treats and cures people was not directed toward the public. Also, the defendant did not assert that he possessed special skills or abilities in diagnosing or treating as would imply an invitation for one to seek his service. Furthermore, he did not hold himself out to the public as being engaged in diagnosis of human ailments and was not therefore practicing medicine without a license).

102. *See, e.g.*, Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) (where the court ruled that the consent of the parent is necessary for a surgical operation on a child); Rishworth v. Moss, 159 S.W. 122 (Tex. Civ. App. 1913) (where the court ruled that the consent of the parent is necessary for a surgical operation on a child).

103. *See* Yorston v. Pennell, 153 A.2d 255 (Pa. 1959) (where a staff surgeon was held liable when a patient was incorrectly given penicillin); Fedor v. Mauwehu Council, Boy Scouts of Am., 143 A.2d 466 (Conn. Super. Ct. 1958) (where an agreement signed by a parent that as a condition of attending camp a child waived all claims for damages in the

Once school officials decide to undertake medication administration, public policy considerations dictate an obligation to ensure that it is competently rendered.[104] As a result, individuals responsible for administration must be properly trained both in regard to the method of administration and to the effects of the specific drugs in use. Proper administration would include proper technique in the handling of needles and syringes, as well as assurances that the correct medication in the right quantity is being administered.

When children are to self administer, they should do so in the presence of the school nurse or trained lay person, but should not do so in front of other children. Furthermore, federal statutes do not require districts to hire physicians, psychiatrists, or LPNs to supervise the procedures.[105] Students who are responsible for self administration should not be permitted to carry the medication;[106] and, for security purposes, all medication should be stored by school officials in a locked compartment.

Medication should be delivered to school officials with the label intact. The label should include the student's name, date of expiration, and directions for use (i.e., dosage; when to consume; what, if anything, to eat or drink when consuming). Also on file should be the student's home or emergency phone number; the name, strength, and serial number of the medication; the names and phone numbers of the physician and pharmacist; and storage instructions (e.g., avoid sunlight, store between thirty-five and sixty degrees). Observe that this recommendation requires that the name of the drug be on file rather than on the label. The reason for this is that such a practice better protects the privacy interests of the child. If it were generally known that a student was taking a particular kind of drug (e.g., ritalin, percodan, morphine, hycodan), it could be potentially stigmatizing.[107] Nevertheless, such information still is needed in case of an emergency and therefore should be readily available in the student's file. Such records also should include notation of the receipt, use, return, and disposal of drugs, syringes, and

---

event of injury was contrary to public policy in so far as it purported to free the defendant from liability for its own negligence). *Cf.* Cohran v. Harper, 154 S.E.2d 461 (Ga. Ct. App. 1967) (where a physician was found not liable when he administered an injection with an allegedly contaminated hypodermic needle; the needle was prepackaged and sterilized, while practices were proper and accepted; also, neither the physician nor his nurse knew, or by exercise of ordinary care could have discovered, that the needle was contaminated).

104. O'Brien v. Township High School Dist. 214, 392 N.E.2d 615, 618 (Ill. App. Ct. 1979).

105. *See, e.g.*, 507 EHLR 121.

106. *But cf.* Bertens v. Stewart, 453 So. 2d 92 (Fla. Dist. Ct. App. 1984) (where a school board's code of conduct rule that students not personally possess "medicine," when applied to a fifth-grade student's possession and distribution of nonprescription vitamin pills, was so vague that it failed to meet due process requirements).

107. *See* Roe v. Ingraham, 403 F. Supp. 931 (S.D.N.Y. 1975).

needles. Additionally, it is recommended that a record be maintained regarding observations of what are thought to be unforeseen medication related changes in behavior. Finally, a comprehensive policy regarding medication administration should include a statement indemnifying those employees who are responsible for administration, while school districts should carry adequate commercial insurance or establish a self-insurance plan sufficiently large to cover possible suit.

Maintenance of Tracheotomy Tube

Another related service that recently has been litigated is the maintenance of tracheotomy tubes. In *Department of Education, State of Hawaii v. Katherine D.*, the plaintiff suffered from cystic fibrosis and tracheomalacia, which caused her windpipes to be floppy instead of rigid.[108] As a result, a tracheotomy tube was implanted which allowed her to breathe and to expel mucus secretions from her lungs. If she were to attend school, this service must be provided. However, based on the recommendation of the placement physician, the district concluded that the medical services the plaintiff might need could not be provided within a school setting and therefore proposed a homebound program. This decision was appealed to an administrative hearing officer who concluded that the homebound program was not the least restrictive environment for Katherine, given that she "was clearly capable of participating in regular classes with nonhandicapped children,"[109] and ordered the district to pay the cost of the existing private placement. The district appealed the decision, and offered a public placement to the student. Existing staff were to be trained to provide her with the necessary services, but were "reluctant" to do so and even filed a related grievance seeking clarification of their contractual responsibilities. Due to this reluctance, and based on her physician's recommendation, the child remained in the private placement. The circuit court ruled that the public placement would be appropriate if the necessary services were provided and did not permit reimbursement for the period following the offer of a public placement.

In a second case, *Hymes v. Harnett County Board of Education*, the child had a tracheotomy tube inserted in his neck to facilitate his breathing.[110] In order to function properly, the tube required periodic suctioning of mucus secretions. As in *Katherine D.*, the district, rather than provide the service, recommended a homebound program. The proffered placement was found to have violated the EHA both at the

108. Department of Educ., State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984).
109. *Id.* at 815.
110. Hymes v. Harnett County Bd. of Educ., 664 F.2d 410 (4th Cir. 1981).

state administrative level and in district court. The substantive results of the trial court were not appealed, although a claim was made regarding attorney fees.[111]

Catheterization

One of the more important health services cases was the Supreme Court decision in *Irving Independent School District v. Tatro*.[112] In that case, the plaintiff, Amber Tatro, had spina bifida and suffered from orthopedic and speech impairments and a neurogenic bladder. To attend school she required CIC services to be performed every three-to-four hours. Such services could be performed by either a school nurse or a layperson with less than one hour of training. The individual education program (IEP) designed for Amber included early childhood development classes and special services, such as physical and occupational therapy, but did not include CIC. The district proposed that such a service was a medical service and therefore was inappropriate for inclusion within an IEP. The Tatros unsuccessfully pursued administrative remedies and filed suit in federal district court. At that level, CIC was ruled not to be a "related service" under the EHA because it did not serve a need arising from the effort to educate. Furthermore, the Rehabilitation Act was found not to have been violated because districts are not required to provide governmental health care for people seeking to participate in federally funded programs.[113]

On appeal to the circuit court, the trial court decision was reversed. The Fifth Circuit Court of Appeals ruled that CIC was a related service, because Amber would not be able to attend classes and thereby benefit from special education without the procedure being performed.[114] The court also ruled that by failing to provide the service the district effectively excluded Amber from a program receiving federal financial assistance and thereby violated section 504 as well. The case then was remanded to the district court where damages and attorney fees were awarded.[115] That decision again was appealed to the circuit court where it was affirmed[116] and then appealed to the Supreme Court where certiorari was granted.[117]

In review of the facts of this case, the High Court reasoned that "[a]

---

111. Attorney fees are now available under the EHA. *See* note 120.
112. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).
113. Tatro v. Texas, 481 F. Supp. 1224, 1229 (N.D. Tex. 1979).
114. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (Tatro I).
115. Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).
116. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) (Tatro II).
117. 464 U.S. 1007 (1983).

service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned."[118] Such a service not only qualified as an important service, but also qualified as a supportive service designed to assist the child to benefit from special education. Furthermore, the Court ruled that CIC is a health service, and not a medical service, and therefore includable within an IEP for other than diagnostic and evaluative purposes. Because CIC does not have to be provided by a medical doctor, and because such service in this case was necessary if the student were to attend school, the Court required that it be provided. However, that part of the appeal that provided damages and attorney fees under section 504 was reversed. The Court referenced *Smith v. Robinson* in support of this position. In that case, it was ruled that relief under section 504 was inappropriate when relief was available under the EHA to remedy the denial of educational services.[119] (Today, given the 1986 amendments, attorney fees now are available under the EHA.)[120]

In addition to *Tatro* a number of additional CIC cases have been resolved.[121] In *Hairston v. Drosick*, a child with spina bifida, a minor physical impairment, and incontinence of the bowels was excluded from regular classes, even though he was capable of participating in such a setting.[122] The district gave the parents three alternatives from which to choose in regard to the child's education: (a) that the mother care for the child during the school day; (b) that the child receive homebound instruction; or (c) that the child attend special education classes. The district court ruled that the exclusion of a minimally handicapped child from a regular public school classroom situation without a bona fide educational reason was a violation of the Rehabilitation Act, and that a child's attendance could not be conditioned on the presence of his mother, even if circumstances permitted her to be present.

A third case, *Tokarcik v. Forest Hills School District*, involved another child with spinabifida, a congenital physical defect, and paralysis from the waist down.[123] She had no mental deficiencies and her performance in the regular classroom was normal for a child her age. Again, as in the previously discussed cases, the district refused to provide CIC services. Accordingly, if Amber Tokarcik were to remain in school, a member of

---

118. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).
119. Smith v. Robinson, 468 U.S. 992 (1984).
120. Pub. L. No. 99-457.
121. In addition to those cases discussed in this chapter, *see also* Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978).
122. Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976).
123. Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981).

her family would be required to catherize her once per day. The parents opposed this decision and filed suit in federal district court following the exhaustion of administrative appeals.

Included within its defense, the school district argued that the complaint was time barred (i.e., the statute of limitation had expired). In review of this claim, the Third Circuit Court of Appeals noted that where federal law is not specific in regard to a statute of limitation, resort to state statute still is not automatic if such a state limitation is in conflict with the objective of federal law. In finding Pennsylvania statute too restrictive, the court concluded that "when dealing with a federally created right, it is the federal courts which must decide which state limitation statute provides the proper referent . . . . If state limitations law conflicts with federal procedural safeguards embodied in the Education Act, the federal concerns are paramount."[124] After resolving the limitations defense, the court reviewed the congressional intent of the EHA as well as its standards, procedures, and definitions. The court then concluded that the plaintiff qualified as handicapped under the Act, that CIC was a related service, and that the district must provide the service at no expense to the parents.

Climate Control

In an unusual case, *Espino v. Besteiro,* the district had placed a multihandicapped child who could not adequately regulate his body temperature in a plexiglass air-conditioned cubicle within a regular nonair-conditioned classroom.[125] Due to the child's inability to either dissipate or conserve heat it was essential that he be provided a climate controlled environment if he were to attend school. To meet this need, the superintendent, rather than air-condition the single classroom, chose to have the cubicle constructed and placed in the classroom without consulting the Admission, Review, and Dismissal Committee or the parents. The superintendent felt that such an arrangement would meet the child's unique needs, and would not open up "Pandora's box," by encouraging parents of other children to complain that their children were not being educated in air-conditioned classrooms. The director of special services for the district also supported the use of the cubicle, but for a different reason: he felt that it would be easier to control the temperature within the cubicle than within the classroom. In practice, use of the cubicle made it difficult for the child to interact with his peers, and at times made it impossible even to understand instruction. Initially

124. *Id.* at 449. *See also* Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part, rev'd and remanded in part on other grounds,* 645 F.2d 592 (8th Cir. 1981).

125. Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981).

the cubicle had no sound system, while even after a one-way radio receiver was placed in service, it proved less than satisfactory due to background noise, the loudness of the air-conditioner, interference with a radio station, and the child's "fiddling with the controls." Nevertheless, the child performed well in school and appeared to get along well with his classmates in spite of his limited interaction with them. After examining these and related facts, the court ruled that such segregation violated the child's rights and enjoined the practice. In peroration, the court stated that "[w]ith the possible exception of a child whose immunological system requires that he . . . be kept within a sterile atmosphere, education within a cubicle will hardly ever be appropriate."[126]

Conclusion

Health related services have become more available over the last fifteen years due in part to the case law discussed above. However, there are limitations, including restrictions on services performed by medical doctors, psychiatrists, and nurses. Nevertheless, those health related services that permit the child to be in attendance and to benefit from special education appear to have firm support both in the legislature and in the courts.

---

126. *Id.* at 914.

Chapter 5
Drug Testing

The use of illegal drugs in the United States is greater than in any other industrialized nation. Furthermore, although the use of illegal drugs in schools has been a major problem for over fifteen years, efforts by educators to reduce occurrences have been unsuccessful in most systems. In 1985, over 16% of high school seniors claimed to have used cocaine at some time in their lives, 61% claimed to have used some form of illegal drug, and one of six thirteen year olds confessed to have used marijuana. To further enhance the problem, 57% of teenagers claim to have purchased their drugs while at school; one third of marijuana users report to have smoked at school; and of those seniors who used amphetamines during the past year, two-thirds claim to have taken them while on school grounds.[127]

To help prevent the use of illegal drugs on school grounds, and the sale of drugs on or near school property, Congress enacted legislation increasing the penalty for distribution of narcotics within 1,000 feet of a public or private elementary or secondary school.[128] The so called "schoolyard" provision of the statute does not require knowledge of the proximity of a school,[129] evidence that the location of the sale is one where school children are presently or likely to congregate,[130] or proof that the particular sale had detrimental effects on school children.[131] Also at the federal level, the Drug-free Schools and Communities Act was signed into law by President Reagan in October 1986. That law will provide $159.1 million to the states to support programs, research, and personnel training to help combat the school drug problem. (See Table 5 for a list of state allotments.) In recent years, state and local governments also have enacted laws restricting the sale and use of illegal drugs, while many school systems already are providing special training to their employees so that they will be better equipped to identify students who are under the influence of drugs or alcohol. Additionally, other school systems are now requiring drug testing of students and employees. Such testing has constitutional implications and is the focus of this chapter.

General Search Standards

In a 1985 case, *New Jersey v. T.L.O.*, the Supreme Court for the first

---

127. United States Department of Education, Schools Without Drugs (1986), at 5.
128. 21 U.S.C.A. §§ 812, 841(a)(1), and 841(b)(1)(B) (1981) and 21 U.S.C.A. § 845a(a) (West Supp. 1986).
129. United States v. Falu, 776 F.2d 46 (2d Cir. 1985).
130. United States v. Jones, 779 F.2d 121 (2d Cir. 1985).
131. United States v. Agilar, 779 F.2d 123 (2d Cir. 1985).

Table 5

Drug-free Schools and Communities Act of 1986:

State Allocations for 1987

State	Allotment	State	Allotment
Ala.	$2,760,904	Mont.	$ 795,505
Alaska	795,505	Neb.	1,058,234
Ariz.	2,018,106	Nev.	795,505
Ark.	1,611,093	N.H.	795,505
Calif.	15,598,768	N.J.	4,639,947
Colo.	2,007,930	N.M.	1,024,316
Conn.	1,872,259	N.Y.	10,874,028
Del.	795,505	N.C.	4,015,861
D.C.	795,505	N.D.	795,505
Fla.	6,074,667	Ohio	7,092,200
Ga.	4,032,819	Okla.	2,170,735
Hawaii	795,505	Ore.	1,709,454
Idaho	795,505	Pa.	7,231,262
Ill.	7,478,862	R.I.	795,505
Ind.	3,741,127	S.C.	2,289,448
Iowa	1,909,569	S.D.	795,505
Kan.	1,536,474	Tenn.	3,106,865
Ky.	2,554,006	Texas	11,111,452
La.	3,225,577	Utah	1,421,153
Maine	795,505	Vt.	795,505
Md.	2,659,151	Va.	3,517,270
Mass.	3,401,949	Wash.	2,764,296
Mich.	6,179,812	W. Va.	1,339,751
Minn.	2,689,677	Wis.	3,117,040
Miss.	1,953,662	Wyo.	795,505
Mo.	3,188,268	Total*	$159,101,000

*Total includes aid to outlying areas and territories. Source: United States Department of Education; USA Today, January 26, 1987, at 9A.

time examined the responsibilities of school officials under the fourth amendment.[132] That amendment ensures the right of individuals to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Furthermore, if the probable cause standard is met, the amendment permits the issuance of a warrant which describes the place to be searched and the persons or things to be seized.

In the 1985 case, a teacher saw T.L.O. and a companion smoking in a lavatory. Such an act, although not a violation of state criminal law, violated local school policy. The teacher took the girls to the office of the assistant vice principal, Mr. Choplick. T.L.O.'s companion admitted to smoking, but T.L.O. denied that she had been smoking, and even denied that she was a smoker. Given the conflict in testimony, the administrator demanded to see the student's purse. After he opened it, he found and removed a pack of cigarettes. Under the cigarettes was a package of rolling papers which Mr. Choplick associated with marijuana use. He then proceeded to thoroughly search the purse, finding a small amount of marijuana, a pipe, a number of plastic bags, numerous one dollar bills, a list of students who owed T.L.O. money, and two letters implicating her in drug dealing. Mr. Choplick then notified the girl's parents and turned the evidence over to the police. T.L.O. confessed that she had been selling marijuana on school property and the police filed delinquency charges against her. In court T.L.O. contended that the search of her purse violated the fourth amendment and moved to suppress both the evidence found in her purse and her confession. The juvenile court denied the motion, which later was upheld by the appellate division, but the New Jersey Supreme Court reversed the ruling and ordered the suppression of the evidence. The United States Supreme Court granted certiorari to examine the appropriateness of the exclusionary rule in instances involving illegal searches by school authorities, but, after concluding that the search of the purse was not a violation of the Constitution, the Court only had to determine the proper standard for assessing the legality of such searches.

Justice White delivered the opinion of the Court and concluded that the fourth amendment applies to searches of students by public school officials. However, the Court's majority went on to note that the probable cause and warrant standards would not be required if a search is reasonable. In the present situation, although the student possessed a reasonable expectation of privacy of the contents of her purse, the interest of school officials in maintaining order and discipline was found paramount given that there existed a reasonable and individual suspicion of wrongdoing.

---

132. New Jersey v. T.L.O., 469 U.S. 325 (1985).

According to the Supreme Court, to determine whether a search is reasonable a court must establish whether the search was justified at its inception, and whether it was reasonably related to the circumstances that justified the interference in the first place. A search ordinarily will be justified at its inception where there are reasonable grounds for suspecting that the search will generate evidence that the student has violated the law or a school rule; a search is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[133] Applying the above standards, the search of T.L.O.'s purse was held not to be unreasonable. The report to Mr. Choplick that there had been a smoking violation warranted a reasonable suspicion that the plaintiff had cigarettes in her purse—note, however, that possession of cigarettes was not a violation of school rules, but smoking was. The search, nevertheless, was found reasonable given that possession would further substantiate the eye witness testimony. Also, the discovery of the rolling papers prompted a reasonable suspicion that T.L.O. was carrying marijuana, thus justifying the additional search.[134]

The standards established in T.L.O. and other Supreme Court decisions have been the bases for most drug-testing case law. In each case, the individual's expectation of privacy was balanced with the interests of the state, while the reasons for the search, the intrusiveness of the search, and the procedures followed in conducting the search were examined.

Related Cases

To determine whether a particular search was justified at its inception and whether the search was reasonably related to the circumstances that justified the search in the first place, the courts will consider the nature of the relationship between the state and the person to be searched. Some individuals have virtually no expectation of privacy (e.g., prisoners),

---

133. *Id.* at 744.

134. In addition to this general search case, the Supreme Court also has examined a drug testing case, Schmerber v. California, 348 U.S. 757 (1966), where it allowed the admission of evidence obtained through a blood test conducted on a person who suffered injuries in an automobile accident. The test had been performed by a physician at the request of a police officer who suspected the person to be intoxicated. The plaintiff charged that taking the sample violated the fourth amendment. The High Court concluded that although a search had taken place, it was not unreasonable given that probable cause existed and that it had been conducted in a manner that insured the plaintiff's privacy. In concluding that the test was permissible, the Court considered the degree of likelihood that intoxication would be found, the exigency created by the metabolism of blood alcohol, the reliability of the test being used, and the manner of blood extraction.

while others have a limited or qualified expectation (e.g., military personnel). Such relationships often determine whether the search was in fact reasonable. Several related cases are included to help demonstrate this point.[135]

Prisoners

Due to their incarceration and need for supervision, prisoners have few personal freedoms, while those they do maintain typically are qualified. One such qualified right involves the right to privacy, given that the definition of a "reasonable search" is quite broad for this population. A case in point is *Storms v. Coughlin* where prisoners were randomly selected to submit to urinalysis drug testing even though no individual suspicion was present.[136] A federal district court found the testing not to violate the Constitution, given the governmental interest in maintaining security, and only required that it be conducted randomly in order to avoid harassment. In developing its position, the court cited the Supreme Court ruling in *Bell v. Wolfish* where a body cavity search conducted on prisoners without either probable cause or reasonable suspicion was upheld.[137] Accordingly, if a body cavity search may be conducted without individualized suspicion, then it followed that a far less intrusive search such as urinalysis also is permitted.[138] However, the

---

135. Selected portions of this section are similar to those found in a related article. *See* White & Thomas, *Drug Testing in Public Schools*, 7 J. Educ. Equity & Leadership (Sum. 1987).

136. Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

137. Bell v. Wolfish, 441 U.S. 520 (1979). *See also* United States v. Shields, 453 F.2d 1235 (9th Cir. 1972) (where a body cavity search was held reasonable).

138. *See also* Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985) (where the court permitted the use of a confirmed EMIT test in a disciplinary hearing against a prisoner); Peranzo v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985) (where inmates failed to establish a basis for an injunction prohibiting use of urinalysis drug test results in future disciplinary proceedings or parole determinations); Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (where the court upheld the use of an unconfirmed EMIT test); Orr v. Kuhlman, Mot. No. 46, slip op. (N.Y. County Court Oct. 19, 1984) (where the court upheld the use of unconfirmed urine test results); Smith v. State, 298 S.E.2d 482 (Ga. 1983) (where the court held that unconfirmed EMIT test results were admissible at a probation revocation hearing). *But see* Higgs v. Wilson, 616 F. Supp. 226 (W.D. Ky. 1985) (where the court held that inmates were entitled to a preliminary injunction enjoining corrections officials from taking disciplinary actions against them based solely on unconfirmed EMIT test results); Johnson v. Walton, No. 561-84 Rm (Vt. Super. Ct. Feb. 14, 1985) (where the court required the state to confirm a positive drug test); Kane v. Fair, Civ. No. 136229 (Mass. Super. Ct., Aug. 5, 1983) (where the court enjoined the introduction of a positive EMIT test in a prison disciplinary hearing unless such evidence was confirmed by a second method). *Cf.* Ferguson v. Cardwell, 392 F. Supp. 750 (D. Ariz. 1975) (where the court ruled that blood may be drawn from prisoners suspected of taking drugs if no force is used, the facilities are clean, and the sample is taken and analyzed by medical personnel).

court went on to note that the conduct of the search should be no more degrading than is reasonably necessary to satisfy the legitimate security interests of the institution.

In a related case, *Ewing v. State*, a probationer was arrested for possession of heroin. While incarcerated the plaintiff's urine was tested and found to contain a residue of morphine.[139] The results of the urinalysis then were introduced into evidence at a probation-revocation hearing. In court, the plaintiff challenged the use of the test results and claimed a violation of the fifth amendment privilege against self incrimination.[140] The court disagreed with the plaintiff's position that a constitutional violation existed and ruled that the trial court did not abuse its discretion in revoking the probation.

Military Personnel

In a similar ruling involving military personnel, *Committee for GI Rights v. Callaway*, the District of Columbia Circuit Court ruled that drug inspections and drug testing of individuals in the European Command were permissible without individualized suspicion due to the interest of the government in eliminating drug use by those involved in national defense.[141] In examining the reasonableness of the challenged practices, the court observed that the increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of the military; the expectation of privacy of a military person is different than it is for a civilian; the primary purpose of drug inspections is to ferret out illegal drugs as a means of protecting the health of the unit and assuring its fitness to accomplish its mission; punitive actions would be incidental to the primary purpose; inspections appear to be the most effective means of identifying drug users; and efforts were made to guard the dignity and privacy of the soldier insofar as practical.[142] Taken in the aggregate, these facts supported the reasonableness of the procedures in this instance.[143] However, the court went on to note that persons in the military are in a unique relationship to government and that "what is reasonable in one context may not be

139. Ewing v. State, 310 N.E.2d 571 (Ind. Ct. App. 1974).

140. *See also* South Dakota v. Neville, 459 U.S. 553 (1983) (where admission into evidence of defendant's refusal to submit to a blood-alcohol test was ruled not to violate the fifth amendment).

141. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.D.C. 1975).

142. *Id.* at 476-77.

143. *See also* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (where compulsory urinalysis for service members was held constitutional); Cupp v. Murphy, 412 U.S. 291 (1973) (where the court upheld the taking of a sample from under the fingernails of a person who was suspected of the strangulation murder of his wife).

reasonable in another."[144]

Public Employees

In recent years, there have been a myriad cases involving the drug testing of public employees, including police officers,[145] corrections officers,[146] electrical workers,[147] and bus drivers.[148] These cases were similar in that only those persons who were individually suspected of drug use were required to submit to blood or urine testing. Individual suspicion was established by general observation, involvement in a traffic accident, or information received by a confidential informant. Individuals testing positive or refusing to be tested were dismissed. Neither en masse testing nor random testing was performed. Each of the practices was ruled to be a search, but not to be unreasonable once individual and state interests were balanced.

Had the public employer in any of these cases not had individual suspicion, it is quite probable that the practice would have been declared impermissible, in spite of the fact that the need for each of these individuals to have a "clear head unbefuddled by narcotics [is] self-evident."[149] In the police officer case, *Turner v. Fraternal Order of Police*, the court on numerous occasions observed the importance of "suspecting" an individual of drug use prior to requiring him to submit to urinalysis, even though such a test "is not an extreme body invasion."[150] To the court, "[t]here must be a reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use"[151] if such testing is to meet fourth amendment requirements. Likewise, in the corrections officer case, *King v. McMickens*, the higher probable cause standard again was not required because the search was not aimed at the discovery of evidence for use in a criminal trial.[152]

---

144. Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.D.C. 1975).

145. Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985).

146. McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (where the court permitted the Department of Corrections to demand that employees suspected of drug use submit to urine testing); King v. McMickens, 501 N.Y.S.2d 679 (N.Y. App. Div. 1986) (where requiring corrections officer suspected of drug use to submit to urinalysis was upheld). *See also* Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984) (where strip searches of corrections officers was ruled permissible only with reasonable suspicion).

147. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

148. Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

149. Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985).

150. *Id.* at 1009.

151. *Id.*

152. King v. McMickens, 501 N.Y.S.2d 679, 681 (N.Y. App. Div. 1986).

School Employees

Drug testing of school personnel also is becoming common. Such employees obviously have an expectation of privacy and, unlike prisoners or military personnel, have not had that right significantly qualified. Furthermore, although school employees do not deal with safety to the degree that police and corrections officers, electrical workers, and bus drivers do (with the exception of school bus drivers and mechanics), if they are to be tested for drugs it is apparent that they have no fewer "rights" than do other public employees.

In a recent case, *Patchoque-Medford Congress of Teachers v. Board of Education*, the teachers' organization challenged the right of the board to require urinalysis as part of a mandatory physical examination required for all probationary teachers whose tenure appointments are pending.[153] Accordingly, individual suspicion of drug use was not a factor in the selection of persons to be tested, while there was no basis for believing that even one of the tested teachers had ever used or currently was impaired by illegal drugs. In this case, the court weighed the teachers' expectation of privacy against the interest of the board of education in overseeing employees and in investigating possible misconduct in the performance of their jobs.[154] In reaching its decision, the court reasoned that although the identification of teachers who are using drugs is important, it did not outweigh the individual expectations of privacy, given that not even a "scintilla of suspicion" was present and that drug use by teachers did not represent grave and imminent consequences to public safety.[155]

A second school-employee case, *Jones v. McKenzie*, involved a school bus attendant (a person primarily responsible for the safe loading and unloading of handicapped children) who was dismissed following a

---

153. Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (N.Y. App. Div. 1986).

154. In determining that teachers maintained a legitimate expectation of privacy, the court distinguished the teaching profession from pervasively regulated occupations where employees have a diminished expectation of privacy and where intrusive testing may be permitted even in the absence of articulable individualized suspicion. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972) (firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) (horse racing); *In re* Martin, 447 A.2d 1290 (N.J. 1982) (casino gambling). In such occupations, selection of individuals for testing generally is either en masse or random (by lot or chance), but is not left to administrator discretion.

155. *See also* Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y. Sup. Ct. 1986) (where police officers were required to submit to drug testing); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. 1985) (where police and firemen submitted to urine testing); Krolick v. Lowery, 302 N.Y.S.2d 109 (N.Y. App. Div. 1969), *aff'd*, 308 N.Y.S.2d 879 (N.Y. 1970), *cert denied sub nom.*, Vyse v. Lowery, 397 U.S. 1075 (1970) (where firefighters suspected of intoxication were required to submit to blood testing).

single unconfirmed positive urinalysis drug test.[156] En masse drug testing of transportation employees was required in the district due to a significant increase in traffic accidents and absenteeism, numerous incidents of erratic and abnormal behavior by division employees, the discovery of syringes and bloody needles in the restrooms frequented by those same employees, and a lack of success of observation and undercover surveillance in identifying specific individuals involved in drug use. The plaintiff in this case tested positive for marijuana, and the test was repeated manually; however, the test was not confirmed by a second method or test, although such procedure was recommended by the manufacturer.[157] After being informed of the test result, the plaintiff submitted to two additonal urinalysis tests, both of which yielded negative results. In spite of these results, the plaintiff was fired without a hearing and filed suit. The court found urinalysis drug testing to constitute a search and, as conducted, to be unreasonable. In balancing the interests of the individual and the state, the court concluded that the plaintiff as an attendant, unlike a bus driver or mechanic, was not directly responsible for children's safety and was not personally suspected of drug use. As a result, the state's position was weakened in establishing that the search was reasonable, and a fourth amendment violation was found to exist. Notwithstanding this conclusion, the court in dicta proposed that had individualized suspicion existed and had the search otherwise been conducted legally, the attendant may have been given a temporary reassignment or suspension pending confirmation of a positive EMIT test.

Students

Policy in an Arkansas school district stipulated that students could be required to submit to blood, breath, urine, or polygraph testing to determine the presence of drugs or alcohol. The tests were to be administered in cases where external evidence and overt behavior of the student determined the need, while parental presence or consent was required for urine testing. The constitutionality of this policy was

156. Jones v. McKenzie, 628 F. Supp 1500 (D.D.C. 1986).

157. The most widely used method of determining the presence of drugs in urine is termed the immuno-assay technique. Such tests cost about $10, but require confirmation either by conducting a second immuno-assay test or by an alternative method (e.g., by thin layer chromatography, gas chromatography, and gas chromatography/mass spectometry). Each of these additional confirmation methods is more complex, time consuming, and costly ($80-$100 per sample) than the immuno-assay technique, but must be performed if accuracy is to be assured. Accuracy rates range from 70% to 98% depending on study reviewed.

challenged in three separate instances which were combined in *Anable v. Ford.*[158]

The first challenge occurred when a twelve year old boy charged that he labored under the threat of policy enforcement and that his constitutionally protected conduct was thereby "chilled." The conduct he alleged to be stifled was one instance of taking Nytol and the occasional drinking of a glass of wine, with parental supervision and approval. The court dismissed the charge since the plaintiff did not have standing to challenge the policy because he had been neither tested nor disciplined as a result of its enforcement.

The second alleged violation of fourth amendment rights involved a student who was accused of being under the influence of alcohol. The accusation was based on his disruptive and argumentative behavior, in addition to the smell of alcohol on his breath and clothing. Furthermore, a search of his car produced soda bottles smelling of liquor. The student was given the option of withdrawing from school, being expelled, or taking a breathalyzer test at police headquarters. He opted to take the breathalyzer test thinking that if he registered at .1% or below he would "pass." His score was .06%, which was less than the .1% legal limit, but which nevertheless qualified as a "trace." School policy stipulated the latter standard, rather than the former law enforcement standard. As a result of his "failing" this test, the student agreed to withdraw, but later filed suit. In this part of the decision, the court reasoned that the student had voluntarily submitted to the test,[159] that there existed individualized suspicion, and that there was sufficient evidence to discipline the student even if the test had not been performed or if the student had "passed" the test. In examining the relative intrusiveness of the test, the court held that a breathalyzer is not an exceptionally invasive procedure, stating that "[t]aking a student to the police station to blow into a breathalyzer machine is little more invasive in itself than taking a child to a five-and-dime store to blow up a balloon."[160]

The final allegation involved urine tests performed on three female students. At least one of the girls apparently had been smoking

---

158. Anable v. Ford, No. 84-6033, slip op. (W.D. Ark. July 12, 1985), *modified* (W.D. Ark. Sept. 5, 1985).

159. *See also* State v. Locke, 418 A.2d 843 (R.I. 1980) (where a person arrested for drunk driving voluntarily submitted to a breathalyzer test and the search was held not to violate the fourth amendment). *But see* State v. Berker, 391 A.2d 107 (R.I. 1978) (where implied consent was ruled inadequate thereby resulting in the inadmissibility of breathalyzer test results); Holland v. Parker, 354 F. Supp. 198 (D.S.D. 1973) (where state implied consent law was declared unconstitutional); Davis v. District of Columbia, 247 A.2d 417 (D.C. 1968).

160. Anable v. Ford, No. 84-6033, slip op. (W.D. Ark. July 12, 1985), *modified* (W.D. Ark. Sept. 5, 1985), at 31.

marijuana in the lavatory, although none exhibited symptoms of marijuana use, but the verbal testimony from the girls conflicted as to the guilty party or parties. As a result, all three were tested the following Tuesday with parental consent. One of the girls tested positive and withdrew from school, thereby losing credit for the fall semester. She later filed suit and claimed that she had not smoked while at school, but rather had smoked over the weekend prior to being tested. Interestingly, she also testified to drinking vinegar after smoking. Her father had told her that vinegar would cause the test result to be negative, but she claimed that she had not made an effort to distort the test results—in fact, she drank the vinegar solely because, in her words, "I like vinegar." The court cited this testimony as an example of the inherent untrustworthiness of the plaintiff's comments and declared that her claim of a fondness for vinegar almost insulted the intelligence of the court.[161] In spite of this testimony, the court ruled on behalf of plaintiff because she was not informed of the evidence against her (one other girl's accusations) and because she was under the impression that the test was required. Additionally, the court was concerned about the test's validity and noted that all it could prove was whether a marijuana-like substance had been ingested within the preceding weeks or days. The test does not determine degree of impairment,[162] when the drug was taken, or where the drug was taken. Accordingly, the court concluded that it would be improper to use drug testing to regulate out-of-school conduct.

A second student drug testing case emanated from New Jersey in 1985, *Odenheim v. Carlstadt-East Rutherford Regional School District*.[163] That case represents perhaps the least offensive type of drug testing program possible, but was found violative of the Constitution due to a lack of individualized suspicion. Students enrolled in the district were required to submit annually to a physical examination that was designed to identify the existence of physical defects, illnesses, communicable diseases, and fitness to participate in school-sponsored health, safety, sport, and physical education activities. A test for drugs was included among the urine tests performed. If a student tested positive, he was not suspended or expelled, but rather was entered into an appropriate rehabilitation program designed to help him recognize the danger of drug use and to remedy any problem that may exist. School medical personnel performed the physical examination in a minimally intrusive manner, while all records remained confidential and separate from academic files. The primary basis of the district's argument was

161. *Id.* at 8, 45.

162. Blood tests measure impairment better than do urine tests.

163. Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

that drug use is an illness, or at least a departure from normal health, and is subject to investigation in spite of traditional search and seizure requirements. The court disagreed with this claim and stated that the "spectrum of items that could be approached simply by defining them as medical is limitless," and that to accept the district's "position suggests that medical testing is without limits."[164] The court declared that the practice was not reasonably related in scope to the circumstances which justified the interference in the first place and concluded that the Constitution had been violated.

Conclusion

It is clear that blood, urine, and breath tests qualify as searches under the fourth amendment,[165] particularly if voluntary consent is not provided. Accordingly, if any of these tests is to be required of students or employees, the reasonableness standard must be met.[166] In determining reasonableness, the court will conduct a two part inquiry: was the search justified at its inception (i.e., were there reasonable grounds for suspecting that the search would turn up evidence that the student violated the law or a school rule) and was the search reasonably related to the circumstances that justified the interference in the first place (i.e., were the search procedures reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction).

Justified at Inception

Questions asked under this topic include: is there a law or school rule violated; is there reason to believe that a particular student committed the particular violation; and is there evidence in addition to the test results that support the allegation that a law or policy has been violated.

---

164. *Id.* at 713.

165. For a discussion of other types of body searches see, Winston v. Lee, 105 S. Ct. 1611 (1985) (where extensive surgery to remove a bullet was held unreasonable); United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984) (where the detention of persons suspected of smuggling contraband in their stomachs until the contraband was expelled in a bowel movement was upheld); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (where surgical removal of a bullet was held reasonable), *cert. denied*, 429 U.S. 1062 (1977); Hughes v. United States, 429 A.2d 1239 (D.C. 1981) (where surgical removal of bullets was held reasonable). Furthermore, a future case may emanate from Brunswick, Georgia where police medically induced a drug-possession suspect to regurgitate a small plastic bag containing cocaine. A warrant to search the stomach of the plaintiff had been acquired. USA Today, Jan. 7, 1987, at 3-A.

166. Furthermore, the permissibility of the use of drug testing in pre-employment screening remains unclear. *See* Dole v. Railway Labor Executives' Ass'n, No. A-551 (U.S. Jan. 27, 1986).

Related to Objective

Questions asked under this topic include: will the search, as conducted, provide the information needed (e.g., a urine test will not provide information regarding impairment, when the drug was taken, or where the drug was taken); is there a second method or test that can be used to confirm the results of the first test; are precautions being taken to ensure the accuracy of the test (e.g., are samples labelled correctly; are sample jars cleaned properly prior to use; are samples acquired and stored properly);[167] are staff members knowledgeable of the methods of sample collection to avoid contamination; are procedures for accurate testing understood and followed; are procedures for confirmation understood and followed; and was a partial medical history taken to guard against false positives. False positives may result when a person consumes herbal teas and certain antibiotics (cocaine); over-the-counter cough medicines (heroin); over-the-counter drugs (phenobarbitol); diet pills, nasal decongestants, heart and asthma medication (amphetamines); poppy seeds (opium); and as many as eleven legal substances, including Advil and Nuprin (marijuana)

Intrusiveness

Questions asked under this topic include: given the nature of the alleged violation, is the intrusiveness of the search excessive; is the search conducted in such a way as to insure the privacy of those persons being searched; and are efforts being made to protect the confidentiality of those involved.

167. Banks v. Federal Aviation Admin., 687 F.2d 92 (5th Cir. 1982) (where the court required the defendant to retain urine samples so that they could be confirmed by the plaintiff).

Chapter 6
Child Abuse

Child abuse and neglect are reported far more often today than any time in history; however, whether child abuse actually has increased is not known. All that is clear is that the abuse of children is not unique either to the United States or to the twentieth century. In fact, child abuse dates back over 4,000 years. Such acts were motivated by a need to discipline, to please certain gods, or to expel evil spirits (particularly when mentally handicapped children were involved); other times, abuse took place based on tradition or custom, or as a result of frustration, jealousy, or anger.

When children were beaten, whipped, mutilated, castrated, enslaved, prostituted, starved, burned, abandoned, or murdered it often occurred without government intervention and, at times, happened with the knowledge, encouragement, or even command of officials. Among the hundreds of examples of sanctioned abuse were the flattening of heads by some American Indians, the shaping of heads into elongated cones by Melanesians, the binding of feet of female children by the Chinese, the selling of offspring by the Romans, and the killing of illegitimate children in many societies. Furthermore, in the United States there has been a long history of abuse to institutionalized and handicapped children as well as to many who were required to serve apprenticeships during colonial times, were enslaved prior to the Civil War, or were made to work in factories.[168]

Notwithstanding the aforementioned, do not assume that child abuse no longer exists, or has even been reduced, for many cultures still bind children's bodies to produce fashionable configurations; pierce ears, lips, and noses; and put to death or brutalize unwanted children. Institutionalized children as well as those in foster homes and natural homes are known to suffer all forms of abuse, often at the hands of those they love and trust the most.[169] In 1984, the number of reported cases rose to over 1,727,000, while the percentage change between 1976 and 1984 was 158.1%. (See Table 6). In addition, as of 1983 parents have authority to order that medical treatment be withheld from a handi-

---

168. *See* Radbill, *A History of Child Abuse and Infanticide* in The Battered Child (Helter & Kempe, eds. 2d ed. 1974), at 3-21; O'Brien, Child Abuse: A Crying Shame (1980), at 5-8; Mayhall & Norgard, Child Abuse and Neglect: Sharing Responsibility (1983), at 3-21.

169. Deaths due to child abuse or neglect were up 29% in 1986 in the twenty-four states where data were collected. Anne Cohn of the National Committee for Prevention of Child Abuse blamed much of the increase on joblessness, neighborhood violence, and "young people having babies."

Table 6

Child Abuse and Neglect Reporting by Year

Year	Number of Children Reported	% Change
1976	669,000	—
1977	838,000	25.3
1978	836,000	-.2
1979	988,000	18.2
1980	1,154,000	16.8
1981	1,225,000	6.2
1982	1,262,000	3.0
1983	1,477,000	17.0
1984	1,727,000	16.9
Increase 1976-84		158.1

Source: Clearinghouse on Child Abuse and Neglect, *Child Abuse and Neglect: An Informed Approach to a Shared Concern* (1986), at 3.

capped newborn knowing that it will die.[170]

Over the years, efforts were made to eliminate, or at least reduce, abuse of children. The Constitution was amended in 1865 prohibiting slavery,[171] while numerous laws were passed regarding child labor and factory safety conditions. Societies for the prevention of cruelty to children were founded in many communities (beginning in New York City in 1871), children aid societies were formed beginning in the 1890's, the White House Conference on Children was conducted in 1909, the National Children's Bureau was formed in 1912, and the number of humane societies grew tremendously during the first half of the twentieth century. During the decade of the 1960's, each state passed a child abuse law, and in 1974, Congress passed The Child Abuse Prevention and Treatment Act (amended in 1984), which created the National Center on Child Abuse and Neglect.

The remaining sections of this chapter examine related definitions as well as several legal requirements affecting educators, including mandates for educators to report child abuse, immunity from civil liability based on good faith reporting, and civil and criminal liability for failure to report. Also, policy recommendations are included. The chapter will not deal with in-school abuse by educators, staff, or students.[172]

Definitions

For purposes of this discussion, the term *child abuse and neglect* means physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare.[173] Neglect, unlike abuse, is viewed as an omission or failure to care for a child and includes the withholding of necessary food, clothing, and shelter. *Sexual abuse* includes the employment, use, persuasion, inducement, enticement, or coercion of any child to simulate or to engage in (or to assist another to

---

170. For a related discussion, see Bowen v. American Hosp. Ass'n, 106 S. Ct. 2101 (1986); Infant Doe v. Bloomington Hosp., *cert denied*, 464 U.S. 961 (1983).

171. Section 1 of the thirteenth amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

172. *See, e.g.*, Ferris v. Austin, 487 So. 2d 1163 (Fla. Dist. Ct. App. 1986) (where plaintiff charged sex abuse by a physical education teacher); Doe A v. Special School Dist. of St. Louis County, 637 F. Supp. 1138 (E.D. Mo. 1986) (where a bus driver allegedly beat and sexually abused children); Miller v. Grand Haven Bd. of Educ., 390 N.W.2d 255 (Mich. Ct. App. 1986) (where a teacher exposed himself to female students); Rivera v. State, 684 S.W.2d 174 (Tex. Crim. App. 1984) (where a part-time teacher sexually abused a child); Boykin v. District of Columbia, 484 A.2d 560 (D.C. 1984) (where a coordinator sexually assaulted a deaf, blind, mute student); Fisher v. Independent School Dist. No. 622, 357 N.W.2d 152 (Minn. Ct. App. 1984) (where a principal sexually molested a student); Holman v. Wheeler, 677 P.2d 645 (Okla. 1983) (where a superintendent beat a child).

173. 42 U.S.C. § 5102(1).

engage in) sexually explicit conduct for the purpose of producing any visual depiction; or the rape, molestation, prostitution, or other form of sexual exploitation; or incest.[174] ***Withholding of medically indicated treatment*** results when a person responsible for a child's welfare fails to respond to an infant's life-threatening conditions by providing appropriate medical treatment, except where the child is irreversibly comatose; or the treatment would merely prolong dying, not be effective in ameliorating or correcting all of the life-threatening conditions, or otherwise be futile or inhumane.[175] State statutory definitions are similar to those presented above, but are unique to each state.

Responsibility to Report

All fifty states and the District of Columbia have mandatory reporting statutes, although they differ considerably regarding who is a mandatory reporter, who may report, to whom to report, and the method of reporting (i.e., oral or written). In developing their respective laws, four models were made available to the states—United States Children's Bureau,[176] Council of State Governments (CSG),[177] American Humane Association (AHA),[178] and American Medical Association (AMA).[179] The Children's Bureau placed a primary duty on physicians, including osteopaths, interns, and residents; the AHA suggested that the reporting requirement extend to all hospital personnel coming into contact with children; the CSG recommended that registered nurses also be responsible for reporting; and the AMA argued that registered or visiting nurses, school teachers, and social workers be encouraged to report.

As of 1985, state statutes were split between those that have a "general" requirement for "all persons" to report (twenty-three states) and those that identify specific persons (twenty-seven states) as mandatory reporters. Each of the states identifying mandatory reporters includes educators among those listed, although there are variations regarding certified and classified staff members and between public and private school employees.[180] In spite of these mandates, educators

---

174. 42 U.S.C. § 5102(2)(A).

175. 42 U.S.C. § 5102(3).

176. United States Department of Health, Education, and Welfare, Welfare Administration, Children's Bureau, The Abused Child—Principles and Suggested Language for Legislation on Reporting of the Physically Abused Child (1963).

177. The American Humane Association, Children's Division, Guidelines for Legislation to Protect the Battered Child (1963).

178. Council of State Governments, Program of Suggested State Legislation (1965).

179. American Medical Association, Physical Abuse of Children—Suggested Legislation (1965).

180. Switzer, *Now's the Time to Reexamine Your Policy on Reporting Child Abuse*, Am. Sch. Bd. J. (Nov. 1985), at 41.

have been reluctant to report suspected abuse. A number of reasons have been given including a lack of diagnostic capabilities; a tendency to report only severe injury; a feeling that reporting abuse may only result in more excessive abuse and impair the student-teacher relationship; limited knowledge of policy and procedure; fear of suit based on invasion of privacy or defamation; and a preference not to interfere with parental rights.[181]

The level of suspicion necessary to base a report is less than probable cause and is phrased in a variety of ways including "reasonable grounds," "cause to believe," "reasonable cause to believe," and "reasonable cause to suspect." Accordingly, the law does not require that an educator know, as a matter of fact, that a child was abused or that a particular person was responsible for the abuse. Rather, state statutes require individuals to report immediately if they form the opinion that there are reasonable grounds to suspect that a child has been injured and that the injury was not due to an unavoidable accident. Who is responsible, when the abuse occurred, and the degree or severity of the abuse are areas to be investigated, and are not prerequisite to reporting.

Once the stipulated level of suspicion is present, the person then must report the suspected abuse either to a superordinate or directly to a designated authority, depending on state law. Reports may be directed to an investigator of a children's services board of the county department of welfare, municipal or county peace officer, juvenile court, or other authorized official or body. Furthermore, state law will determine whether the report must be oral, written, or both. Most states mandate that the report first be oral so that any investigation will not be delayed, and then require that a written statement follow soon thereafter.

Immunity

After a report has been filed, it then is investigated to determine if any action is necessary. By this time, an adversarial relationship between the investigator and the guardians is likely and at least the threat of suit no doubt will emanate. Immunity from suit is now available in all fifty states where reports are made in good faith (i.e., for the benefit of the child; no sinister motive), but as a rule may not be used as a defense where bad faith exists, or where efforts are made to interfere with the filing of a report or its investigation. Furthermore, in approximately half the states there is a presumption of good faith.[182] Immunity may cover

---

181. *See* Levin, *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*, 62 Child Welfare 14, 14-20 (Jan./Feb. 1983).

182. Switzer, *Now's the Time to Reexamine Your Policy on Reporting Child Abuse*, Am. Sch. Bd. J. (Nov. 1985), at 42.

criminal liability, civil liability, or both, or may be delimited to such areas as libel, slander, breach of confidence, or invasion of privacy.

Immunity for reporting was examined in an Oregon case in 1985, *McDonald v. State*.[183] In that case, the parents brought an action against public officials to recover damages claimed to have been caused when a teacher reported to the Children's Services Division that a child may have been abused. When the teacher talked to the child about marks on his neck, he first claimed that a cat had scratched him, but later stated that he had been choked by his mother. Notwithstanding the conflict in statements, the teacher suspected abuse and reported the incident, as required by state law. As a result of this report, the child was removed from school and placed in a foster home. At trial, the defendant's suspicions of abuse were not substantiated either by an examination or by the child's testimony; likewise, it was not proven that the report was motivated by bad faith. Given the above, the court ruled that the defendants were immune from liability.

In a second case, *Roman v. Appleby*, a Pennsylvania district court was asked to determine whether federal rights under the first and fourteenth amendments and section 1983 of the Civil Rights Act of 1871 had been violated and whether pendent state claims for negligence and defamation may be asserted.[184] The basis to the complaint was a recommendation of a school counselor that the parents of a student who may have been emotionally disturbed and mentally unstable contact a mental health counseling service so that the child could undergo treatment. The parents failed to seek help even though the counselor had told them that their son's problems were potentially serious. Due to this lack of cooperation in seeking treatment, the counselor made an oral referral to Children's Services to have the child evaluated and tested, and charged that the parents had refused to provide sufficient psychiatric care. After a hearing, however, the petition was dismissed and the plaintiffs claimed that they had suffered emotional distress and were humiliated by the events. The parents then filed suit, while the defendants claimed good faith or qualified immunity.[185]

In developing its rationale regarding qualified immunity, the court followed its position taken by the Supreme Court in a 1982 decision, *Harlow v. Fitzgerald*.[186] In that case, the High Court noted that traditionally defendants who asserted a defense of qualified immunity had to meet both an "objective" and a "subjective" standard. Under

183. McDonald v. State, 694 P.2d 569 (Or. Ct. App. 1985).

184. Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983).

185. *See also* LaBelle v. County of St. Lawrence, 445 N.Y.S.2d 275 (N.Y. App. Div. 1981) (where parents' claim that removal of their children by police from an apparently unsupervised home violated their constitutional and civil rights failed).

186. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

these tests, qualified immunity was defeated if the person knew or reasonably should have known that his official action would violate the rights of the plaintiff *or* if there was a malicious intent to deprive such rights.[187] The *Harlow* decision dispensed with the subjective element (malicious intent) and ruled that good faith immunity will defeat claims if the official conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. In applying this standard to the present case, the court held that the defendant had not violated clearly established law when she conducted the interviews with the student, referred the matter to Children's Services, or provided an affidavit for use in a petition to have the student adjudicated a dependent.

In addition to immunity for constitutional, civil rights, and tort claims, the defendant also claimed good faith immunity under the state Child Protective Services Law which, under threat of criminal sanction, required her to report to the county welfare agency whenever she suspected that a child had been physically or mentally injured. The court also supported this defense and made it clear that "probable cause," was not required prior to making a report, but rather a "lesser quantum," such as "reason to believe," was sufficient.[188]

Failure to Report

When the requisite level of proof exists to substantiate a report of child abuse, and a mandatory reporter fails to make the necessary report, both criminal and civil liability may result. Criminal liability may involve the paying of a fine (generally between $100 and $1,000) or imprisonment (less than one year). Civil liability may be based either on state tort law,[189] or possibly on section 1983 where federal constitutional or statutory rights are violated.

Where a plaintiff claims negligence for failure to report child abuse, the court will determine (a) whether the person had a legal duty to report suspected child abuse; (b) whether that duty was breached; (c) whether the breach was the proximate cause of subsequent injuries; and (d) whether the child suffered actual injury.[190] Elements "a," "b," and

187. Wood v. Strickland, 420 U.S. 308 (1975).

188. *See also* Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) (where statute required a police officer to have "reasonable cause to believe" that a plaintiff presented a threat to herself). *Compare* Smith v. Heath, 691 F.2d 220, 225-26 (6th Cir. 1982) (where a bad faith search was conducted by police officers).

189. *See* Phyllis P. v. Superior Court, 228 Cal. Rptr. 776 (Cal. Ct. App. 1986) (where it was held that a special relationship existed between a school and a mother, and that the school had a duty to notify the mother upon learning that the child had been sexually assaulted numerous times by a fellow student).

190. Prosser, Law of Torts (4th ed. 1971), at 143.

"d" often are easily proven in this type of case (i.e., is the person mandated to report, was there a report made, and was the child actually injured?) Element "c" (proximate cause), however, represents a more difficult problem, given that the actual injury is inflicted by a third party (often a parent). The vast majority of courts have held that foreseeable intervening acts of third parties do not amount to a superseding cause relieving the negligent defendant of liability.[191] Furthermore, at least as applied to the battered child syndrome,[192] it is clear that assaults on the child are not isolated, but rather are "part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention."[193]

These issues first were examined in *Landeros v. Flood*, a 1976 California Supreme Court decison.[194] In that case, a child had been regularly beaten and abused by her mother and her mother's common law husband. When the child was taken to a hospital she was diagnosed as suffering from a comminuted spiral fracture of the tibia and fibula, an injury commonly caused when an arm is twisted, but also was suffering from multiple bruises, superficial abrasions, and a nondepressed linear fracture of the skull, which were not diagnosed. No explanation was sought from the mother, nor was one tendered. The physician treated the child and then released her. No report was made to the juvenile probation department or law enforcement officials in spite of the fact that an arm injury of this type generally would result in further examination, including numerous X-rays. The complaint averred that if the examination had been conducted properly, the child would have been diagnosed as suffering from the battered child syndrome, thus requiring a report to the proper authorities and the withdrawing of the child from her present household. Nevertheless, the child was released to her mother who continued to abuse her. However, when the child later was examined by a second physician at a different hospital the battered child syndrome was diagnosed and reported immediately and the child was taken into custody and placed with foster parents. In applying the traditional negligence standards identified above, the court ruled that the first physician and hospital could be held liable for injuries sustained by the child if it could be shown that the doctor negligently failed both to diagnose the battered child syndrome and to make the required report, resulting in the child's return to her home where it was foreseeable that she would be further injured.

---

191. *See, e.g.*, Landeros v. Flood, 551 P.2d 389, 395 (Cal. 1976).
192. Kempe, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).
193. Landeros v. Flood, 551 P.2d 389, 395 (Cal. 1976).
194. *Id.*

In addition to state tort law, future cases involving the failure to report suspected abuse may be based on section 1983 liability. That statute originally was part of the Civil Rights Act of 1871 and stipulates that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate or [t]erritory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[195]

The term "person" is not defined in the Act, but the Supreme Court has concluded that local governments (including public school boards,[196] cities, and counties) are persons and therefore may be sued under section 1983. Furthermore, persons acting under color of state law may not claim eleventh amendment immunity,[197] although individuals performing their responsibilities in good faith, even if later proven to be in error, may claim good faith immunity. Such immunity does not extend to public institutions, or to individuals who act in bad faith.

Section 1983 does not provide substantive rights in and of itself and therefore must attach to a constitutional or civil rights violation claim. In regard to child abuse, the complaint may propose that the child has a liberty right under the fourteenth amendment to be free from harm;[198] that an affirmative obligation to protect or intervene on behalf of a known or suspected child abuse victim may arise from a special custodial or other relationship, such as a mandatory requirement to report abuse;[199] that it is not necessary for the perpetrator of the actual harm to be in control, custody, or supervision of the state or local government entity to impose an affirmative obligation to protect or to impose liability for the failure to protect a child abuse victim;[200] and that liability may result for omissions if officials acted intentionally or if they exhibited deliberate indifference to a known injury or risk and failed to carry out the duty to ameliorate that injury or risk resulting in the proximate cause of the deprivation of the child abuse victim's rights

---

195. 42 U.S.C. § 1983.

196. Private schools do not operate under color of state law and therefore may not be sued under section 1983. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

197. The eleventh amendment to the United States Constitution states that "[t]he [j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by [c]itizens of another [s]tate, or by [c]itizens or [s]ubjects of any [f]oreign [s]tate."

198. Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985).

199. Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984).

200. Doe v. New York City Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981).

under the Federal Constitution.[201] Such positions have been taken in cases alleging violations by "persons acting under state statute," but have not as yet involved educators.[202] In any of these settings, the plaintiff will have difficulty substantiating a section 1983 claim, because an error in judgment or an unforeseeable tragic event, a good faith but misinformed professional decision, or mere negligence will not suffice to impose liability under section 1983. In fact, plaintiffs will have to prove gross negligence showing that the practices were so far below the minimum accepted and generally prevailing professional standards as to infer deliberate or reckless indifference or callous disregard for the safety of children.[203]

Policy

In order to more effectively safeguard the health and safety of school children it is imperative that related school policies be developed and implemented.[204] Although almost all districts today have such policies, many of them are not comprehensive, while many more are neither promulgated nor understood by faulty, staff, and other mandatory reporters. The following guidelines are recommended.

- Include a brief statement in support of the administration of the policy as well as a statement indicating that interference with implementation will not be permitted and that those filing the reports in good faith do so with the full support of the board.
- In lay terms, summarize relevant sections of state statute including who must report; who may report; when to report; to whom to report; how to report; what kinds of information to include in the report; and, if forms are used, where they may be acquired.
- Also summarize the law regarding confidentiality, immunity for good faith reporting, and the potential for criminal and civil liability for failure to report.
- Provide in-service training for all mandatory reporters regarding the legal requirements for reporting as well as how to recognize a child

---

201. *Id.*

202. For related discussions *see* Duggan, *Failure of State or Local Government Entity to Protect Child Abuse Victim as Violation of Federal Constitutional Right*, 79 ALR Fed. 514-20 (1986); Myers, Epley, & Nakaue, *Responding to Child Abuse: Critical Issues for Educators and Their Counsel*, School Law Update 1986 (Jones & Semler, eds. 1986), at 203-21; Siegel, *Failure to Report Suspected Child Abuse: Potential Civil Rights Liability for School Districts*, 34 Educ. L. Rep. 345 (1986).

203. Estate of Bailey v. County of York, 768 F.2d 503, 508 (3d Cir. 1985).

204. *See also* Mondschein, *Legal Responsibility of Educators in Child Abuse*, School Law Update: Preventive School Law (Jones & Semler, eds. 1984), at 36-45.

abuse victim. (A table of the more common physical and behavioral indicators of abuse is included—see Table 7.)

Conclusion

Educators are responsible for instructing and supervising young children for approximately six hours per day and are in an excellent position to observe their behavior as well as to identify physical indicators of abuse. Nevertheless, over the years, there has been a great reluctance to report suspected abuse. If mandatory reporters are better informed regarding the legal aspects, and better trained with respect to identification,[205] reporting should increase.

205. Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) (where it was held that the jury could reasonably have found that it was the police department's gross negligence *in training* that caused premature use of deadly force against a suspect).

Table 7

INDICATORS OF CHILD ABUSE

TYPE OF ABUSE	PHYSICAL INDICATORS	BEHAVIORAL INDICATORS
PHYSICAL	Unexplained bruises and welts • on face, lips, or mouth • on torso, back, buttocks, or thighs • in various stages of healing • clustered or forming patterns • shaped like recognizable object (e.g., belt buckle) • appearing regularly after absences, weekends, or vacation periods Unexplained burns • by cigars or cigarettes, especially on soles, palms, back, or buttocks • by immersion in hot liquid, especially on hands, feet, buttocks, or genitalia • shaped in a recognizable form (e.g., electric range coils, electric iron) • by rope on arms, legs, neck, or torso Unexplained fractures • of skull, nose, or facial bones • in various stages of healing • in multiple locations Unexplained lacerations or abrasions • on mouth, lips, gums, or eyes • on external genitalia	Wary of adult contacts Apprehensive when other children cry Extreme aggressiveness or extreme withdrawal Fear of parents Fear of going home Reporting of injury by parents or others
SEXUAL	Difficulty in walking or sitting Torn, stained, or bloody underclothes Pain or itching in genital area Bruises or bleeding in external genitalia, vaginal, or anal areas Venereal disease symptoms, especially in pre-teens Pregnancy	Unwillingness to change clothing or to participate in physical education classes Withdrawal, fantasy, or infantile behavior Bizarre, sophisticated, or unusual sexual behavior or knowledge Poor peer relationships Chronic delinquency Reporting of sexual assaults
EMOTIONAL	Speech disorders Lag in physical development Severe allergies, asthma, or ulcers Alcohol or drug abuse	Habit disorders (e.g., thumb sucking, lip biting, rocking) Antisocial or destructive conduct Psychoneurotic traits (e.g., hysteria, obsessions, compulsions, phobias, hypochondria) Behavior extremes of compliance or aggression Inappropriate adult or infantile behavior Mental and emotional developmental lags Suicide threats or attempts
NEGLECT	Consistent hunger Poor hygiene Inappropriate dress Unattended physical problems or medical needs Alcohol or drug abuse	Begging or stealing food Early arrivals and late departures Constant fatigue or listlessness Chronic delinquency, especially thefts Reporting of no caretaker at home

Source: Myra Herbert, *What Principals Should Know About Child Abuse*, Principal (November, 1985), at 12

Chapter 7
Student Pregnancy

Data from a 1986 study funded by the Planned Parenthood Federation of America indicate that 57% of teenagers have sex by age seventeen, but only one-third of them regularly use contraceptives.[206] It then is not surprising that pregnancy rates among teenagers is increasing dramatically (i.e., over 40% of girls who are now fourteen will become pregnant during their teenage years). As a result of increased sexual activity and pregnancy among school-age students, a number of school-related problems have emanated, including the right of pregnant students to attend regular day school, to attend evening school free of charge, or to participate in extracurricular activities. Also related to this problem is the right of school districts to teach sex education, either as a required or an elective class.

At the federal level, case law examining the aforementioned is based either on title IX of the Education Amendments of 1972, the fourteenth amendment, or the first amendment.[207] Title IX stipulates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance . . . ."[208] Federal regulations promulgated by the Department of Health and Human Services further mandate that a "recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity . . . ."[209] If an alternative program is voluntarily selected, it must be comparable to that offered nonpregnant students.[210] To be eligible to participate in the regular education program, the school district may require the student to obtain

---

206. Healy, *57% of Teens Have Sex at 17*, USA Today, Dec. 17, 1986, at 1-D.

207. A related complaint also may be claimed under state law: an equal rights amendment (ERA), an education clause of a state constitution, or a civil rights statute. Under an ERA, sex would be a suspect class, while under an education clause it is possible that education would be a fundamental right. Accordingly, where either a suspect classification or a fundamental right is involved, strict scrutiny would be applied. However, even if sex were a suspect class, state courts still must determine that discrimination based on pregnancy is in fact discrimination based on sex for an ERA violation to exist. For a related discussion *see* Belsches-Simmons, *Teenage Pregnancy and Schooling: Legal Considerations*, 24 Educ. L. Rep. 1 (1985).

208. 20 U.S.C. § 1681(a).

209. 45 C.F.R. § 86.40(b)(1).

210. 45 C.F.R. § 86.40(b)(3).

a physician's certification that she is physically and emotionally able to continue participating. This certification may be required of pregnant students only if it also is required of all students for other physical or emotional conditions requiring the attention of a physician.[211] Finally, a student who acquires a leave of absence due to medical condition must be reinstated to the status she held prior to the leave.[212]

Although there is some debate regarding the applicability of the above regulations to nonhigher education populations, the regulations as written do not differentiate between students in k-12 and higher education programs. Accordingly, unless a court rules otherwise or unless the regulations are amended, it appears that they also apply to the exclusion and segregation of pregnant students at the elementary and secondary levels. However, one potential difficulty for a plaintiff in a title IX suit is that the statute is delimited to programs that receive federal financial assistance.[213] As a result, if a pregnant student were excluded from a program or activity that did not receive assistance a title IX violation would not exist.

In spite of the above limitation to title IX, a fourteenth amendment equal protection clause violation may be present. Depending upon the particular circumstances of the case, it is possible that a court would apply either the rational relationship standard (when neither a suspect class nor a fundamental right is involved), the intermediate standard (when a fundamental right is not involved, but the discrimination against pregnant persons is a pretext to discrimination based on sex; or if a student is totally excluded or denied an education[214]), or the strict scrutiny standard (when a fundamental right is infringed) (See Chapter 1 for a related discussion.)

Finally, cases involving sex education likely will be based either on the due process clause of the fourteenth amendment or the free exercise and establishment clauses of the first amendment. The first amendment requires in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Case Law

Exclusion from School

Early in the twentieth century, the most common way of dealing with

211. 45 C.F.R. § 86.40(b)(2).
212. 45 C.F.R. § 86.40(b)(5).
213. Grove City College v. Bell, 465 U.S. 555 (1984).
214. Plyler v. Doe, 457 U.S. 202 (1982).

both married and pregnant students was simply to suspend or expel them from school, to segregate them within school, or to permit them to withdraw even though they were within the age range for compulsory attendance. In the few instances where efforts were made to require continued attendance of married students, the courts generally declared the students to be emancipated and therefore not subject to compulsory attendance mandates.[215] Additionally, current case law is decidedly in favor of married and pregnant students who are suspended or expelled. Relevant case law began to develop in the late 1920's with cases such as *Nutt v. Board of Education*, where the Kansas Supreme Court ruled that although a school board was vested with the authority to exclude a student who had a licentious or immoral character, the plaintiff was not shown to be of such character; in fact, the only supported claim by the district was that the girl had conceived out of wedlock.[216]

More recent rulings have provided results similar to those in *Nutt*. In two Mississippi cases (1969 and 1972), the respective federal district courts concluded that unwed mothers could not be excluded from school for the sole reason that they were unwed mothers.[217] Furthermore, if such a student were to be denied readmission the court required the district to provide her with a fair hearing to determine if she was so lacking in moral character that her presence in school would taint the education of others. The court in the 1969 decision made it manifestly clear that although a lack of moral character is a sufficient basis for exclusion, "the fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for

---

215. *See, e.g., In re* State *ex rel.* Goodwin, 39 So. 2d 731 (La. 1949) (where a fourteen year old married student was declared irrevocably emancipated); State v. Priest, 27 So. 2d 173 (La. 1946) (where it was ruled that a fifteen year old married student was emancipated due to her marriage and therefore not required to attend school). *See also In re* Rogers, 234 N.Y.S.2d 172 (N.Y. Fam. Ct. 1962) (where ruled that compulsory education laws do not require school attendance by a female married child under age sixteen).

216. Nutt v. Board of Educ., 278 P. 1065 (Kan. 1929). *See also* O'Neil v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973) (where a regulation excluding a married student from a military school was invalidated); Anderson v. Canyon Indep. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967) (where a regulation temporarily suspending a married student was invalidated); Alvin Indep. School Dist. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966) (where it was ruled that a married student may not be permanently denied an education); Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964) (where a regulation suspending married students was invalidated); McLeod v. State *ex rel* Colmer, 122 So. 737 (Miss. 1929) (where a board resolution prohibiting married students from attending school was invalidated). *But see* State v. Chamberlain, 175 N.E.2d 539 (Ohio C.P. 1961) (where the temporary suspension of pregnant married high school students was upheld); State v. Marion County Bd. of Educ., 302 S.W.2d 57 (Tenn. 1957) (where a temporary suspension of a married student was upheld).

217. Shull v. Columbus Mun. Separate School Dist., 338 F. Supp. 1376 (N.D. Miss. 1972); Perry v. Grenada Mun. Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969).

rehabilitation or the opportunity for future education."[218] Likewise, in a 1971 Massachusetts case a federal district court upheld the right of an unwed mother to attend full-time regular classes if such attendance would not be dangerous to her physical or mental health and if there was no educational or other reason to justify her exclusion.[219] Today, courts still will require school districts to support the claim that the presence of a particular pregnant student will or has resulted in substantial disruption of the school environment, while a blanket policy excluding all pregnant students will likely be found violative of the right to privacy.[220]

Assignment to Night Programs

In *Houston v. Prosser*, the plaintiff, a fifteen year old mother, was denied readmission to the regular day school program, but was permitted to attend night school if she paid for tuition and textbooks.[221] The court observed that although the right to an education is not fundamental under the Federal Constitution,[222] procreation is such a right,[223] and where it is being exercised, any classification that serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. In the present case, however, the court did not find that the right to procreate had been violated, given that night classes were made available, and thus applied the more lenient rational basis test. The intended purpose of the test was to maintain discipline in the school. The court accepted this argument as sufficient to establish a permissible basis for its continuation, given that married students are "more precocious" than other students and that it was "conceivable" that their presence may be disruptive.[224] Notwithstanding the above, the court identified an equal protection violation based on the tuition and textbook charge, because indigency prevented her from attending. Accordingly, the student could be assigned to night school, but must receive the instruction at no charge.

Today, it is possible that another court, when ruling on a similar case, may apply strict scrutiny based on an infringement of a fundamental right (procreation). Also, if the program from which the plaintiff was excluded received federal financial assistance, a title IX violation also

---

218. Perry v. Grenada Mun. Separate School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969).
219. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).
220. Belsches-Simmons, *Supra* note 207, at 1-3.
221. Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973).
222. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
223. Eisenstadt v. Baird, 405 U.S. 438 (1972) (where a state statute limiting the availability of contraceptives to unmarried persons was invalidated).
224. Houston v. Prosser, 361 F. Supp. 295, 298-99 (N.D. Ga. 1973).

may be identified due to the involuntary exclusion of pregnant students from mainstream classes. This position assumes, of course, that the courts will accept the federal regulations interpreting title IX and apply them in a nonhigher education situation.

Exclusion from Extracurricular Activities

The right to participate in extracurricular activities is not a fundamental right, nor is it generally a protected property interest. Accordingly, to prohibit participation of students the school district need only have a rational basis for its policy, assuming a fundamental right is not involved. However, the fundamental right of procreation is involved if student-parents or pregnant students are excluded based solely on parenthood or pregnancy. Related case law has been abundant and generally consistent in this area.[225] Additionally, several courts have identified marriage as a fundamental right and have required a compelling state interest to justify the exclusion of married students from participation in extracurricular activities. For example, the Colorado Court of Appeals in 1977, in *Beeson v. Kiowa County School District*, ruled on behalf of a high school student who was not permitted to play on the girl's varsity basketball team two years after her marriage and the birth of her child.[226] In upholding her right to participate, the court noted that marriage is a fundamental right,[227] and that a "board policy which discriminates against those who exercise that right violates the equal protection clause of the [f]ourteenth [a]mendment . . . ."[228]

Sex Education

State and local board regulations incorporating sex education into the school curriculum have been upheld based either on the failure to identify a substantial constitutional question,[229] or the inability to

---

225. Indiana High School Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975); Bell v. Lone Oak Indep. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974); Hollon v. Mathis Indep. School Dist., 358 F. Supp. 1269 (S.D. Tex. 1973); Moran v. School Dist. No. 7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972). *But see* Estay v. LaFourche Parish School Bd., 230 So. 2d 443 (La. Ct. App. 1969); Board of Directors v. Green, 147 N.W.2d 854 (Iowa 1967); Starkey v. Board of Educ., 381 P.2d 718 (Utah 1963); State v. Stevenson, 189 N.E.2d 181 (Ohio C.P. 1962); Cochrane v. Board of Educ., 103 N.W.2d 569 (Mich. 1960); Kissick v. Garland Indep. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959).

226. Beeson v. Kiowa County School Dist., 567 P.2d 801 (Colo. Ct. App. 1977).

227. Loving v. Virginia, 388 U.S. 1 (1967).

228. Beeson v. Kiowa County School Dist., 567 P.2d 801, 805 (Colo. Ct. App. 1977).

229. Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

substantiate a free exercise or establishment clause violation.[230] Historically, sex education classes have been controversial due to their inclusion of material related to contraception, family planning, birth control, and venereal disease. Today, related programs continue to include such material, but are experiencing even greater pressure due both to the addition of discussions regarding AIDS[231] and homosexuality, and to the availability of contraceptives in school-based clinics.[232] Although these latter issues have not as yet been litigated, the former have been reviewed on numerous occasions to determine whether parental or student rights have been infringed. A case in point is *Smith v. Ricci*, where the New Jersey Supreme Court upheld a state board regulation requiring districts to develop and implement a family-life education program that included human sexuality.[233] Plaintiffs claimed that the free exercise, establishment, and due process clauses had been violated by the practice.

In review of the facts of the case, the court pointed out that the "excusal policy" of the regulation permitted a student to withdraw from all parts of the program that he or his parents found morally, conscientiously, or religiously objectionable. As a result, the court concluded that "[w]here there is no compulsion to participate . . . , there can be no infringement upon appellants' rights freely to exercise their religion."[234] In response to this position, the plaintiffs argued that by requiring students to object to the program in the presence of others exerted an "intolerable pressure" on them to abandon their beliefs and to choose not to exercise their option to be excused. The court found this argument unpersuasive and opined that the Constitution does not

---

230. Smith v. Ricci, 446 A.2d 501 (N.J. 1982); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal Rptr. 68 (Cal. Ct. App. 1975), *appeal dismissed*, 425 U.S. 908 (1976); Hobolth v. Greenway, 218 N.W.2d 98 (Mich. Ct. App. 1974); Hopkins v. Hamden Bd. of Educ., 289 A.2d 914 (Conn. C.P. 1971), *appeal dismissed*, 305 A.2d 536 (Conn. 1973); Valent v. New Jersey State Bd. of Educ., 274 A.2d 832 (N.J. Super. Ct. 1971); Medeiros v. Kiyosaki, 478 P.2d 314 (Hawaii 1970). *Cf.* Aubrey v. School Dist., 437 A.2d 1306 (Pa. Commw. Ct. 1981) (where ruled that courtroom was inappropriate place to argue either the inclusion of sex education in the curriculum or a student's failing grade in that subject); Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich. 1974) (where a state statute prohibiting discussion of birth control in public schools was upheld).

231. Benedetto, *AIDS Studies Become Part of Curricula*, USA Today, Jan. 23, 1987, at 1-D.

232. More than half of 716 school administrators who were surveyed responded that contraceptives should be available in school-based clinics, but only about 2.5% of their respective school systems maintained such a service. Seventy-two percent of the officials stated that their sex education programs helped reduce pregnancy; 80% proposed that pregnant students should be allowed to attend classes with their peers; and 25% thought that the attendance of pregnant students may discourage others from getting pregnant. Hellmich, *School Officials Favor Offering Birth Control*, USA Today, Feb. 3, 1987, at 1-D.

233. Smith v. Ricci, 446 A.2d 501 (N.J. 1982).

234. *Id.* at 505.

guarantee that the exercise of religion will be without difficulty. Furthermore, the court observed that the public school curriculum may not be tailored to comply with religious beliefs.[235]

The gravamen of the second alleged violation, establishment clause, is that the regulation established secularism (or secular humanism) and thereby inhibited traditional religions. In response to this challenge, the court noted that the program is neither antagonistic toward religion nor supportive of nonreligion and that there was no evidence to support the position that the program favored a secular view over a religious one. Accordingly, the establishment clause was not found to have been infringed.

The final complaint, due process clause, proponed that the board did not show a reasonable relationship between the goals of the family-life education program (reduction in pregnancy, venereal disease, and other social problems) and the means to ameliorate the identified problems. Again, the court was not convinced by plaintiff's position and noted that a presumption of reasonableness attached to the acts of the administrative agency. Since the plaintiffs failed to prove that the act was not reasonable, the fourteenth amendment complaint also was found to be without merit.

Conclusion

In 1987, school districts may not exclude married or pregnant students from public school or from extracurricular activities, unless there exists a compelling reason for doing so. Also, if special programs are to be made available for such students, they must be free of charge and generally equal to those provided other students. Furthermore, if a state or school district elects to include classes on sex education in its curricula, an exemption provision is likely to allow the program to withstand a first amendment challenge.

---

235. *Id.* at 506.

Table of Cases

A Family, *In re*, 33
Abeel v. Clark, 12
Allen v. City of Marietta, 47
Alvin Indep. School Dist. v. Cooper, 68
Anable v. Ford, 50, 51
Anderson v. Canyon Indep. School Dist., 68
Arline v. School Bd., 26
Aubrey v. School Dist., 71

Banks v. Federal Aviation Admin., 53
Barber v. School Bd., 12
Beeson v. Kiowa County School Dist., 70
Bell v. Lone Oak Indep. School Dist., 70
Bell v. Wolfish, 45
Bertens v. Stewart, 35
Bissell v. Davison, 12
Blue v. Beach, 12
Board of Directors v. Green, 70
Board of Educ. v. Bentley, 68
Board of Educ. v. Cooperman, 23
Board of Educ. v. Rowley, 31
Board of Trustees v. McMurtry, 12
Bonner v. Moran, 34
Bowen v. American Hosp. Ass'n., 56
Boykin v. District of Columbia, 56
Brown v. Board of Educ., 3
Brown v. Stone, 13

Calandra v. State College Area School Dist., 13
Caruso v. Ward, 48
Citizens for Parental Rights v. San Mateo County Bd. of Educ., 71
City of Palm Bay v. Bauman, 48
Cochrane v. Board of Educ., 70
Cohran v. Harper, 35
Colonnade Catering Corp. v. United States, 48
Committee for GI Rights v. Callaway, 46, 47
Community High School Dist. 155 v. Denz, 25
Cornwell v. State Bd. of Educ., 70
County of Los Angeles v. Kling, 24
Craig v. Boren, 2
Cude v. State, 15
Cupp v. Murphy, 46

Dalli v. Board of Educ., 13
Darlene L. v. Illinois State Bd. of Educ., 32
Davis v. District of Columbia, 50
Davis v. Meek, 70
Davis v. State, 15
Department of Educ., State of Hawaii v. Katherine D., 36
Detsel v. Board of Educ., 33
District 27 Community School Bd. v. Board of Educ., 22, 23
Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 47
Doe v. New York City Dep't of Social Servs., 62, 63
Doe A v. Special School Dist. of St. Louis County, 56
Dole v. Railway Labor Executives' Ass'n, 52
Duffield v. School Dist., 12

Eisenstadt v. Baird, 69
Elwell, *In re*, 12
Espino v. Besteiro, 39, 40
Estate of Bailey v. County of York, 62, 63
Estay v. LaFourche Parish School Bd., 70

Ewing v. State, 46

Fedor v. Mauwehu Council, Boy Scouts of Am., 34
Ferguson v. Cardwell, 45
Ferris v. Austin, 56
Fialkowski v. Shapp, 3
Fisher v. Independent School Dist. No. 622, 56
Frederick L. v. Thomas, 3

G.H., *In re*, 3
Graham v. Richardson, 1
Grove City College v. Bell, 67

Hairston v. Drosick, 38
Hammond v. Town of Hyde Park, 12
Hanzel v. Arter, 13
Harlow v. Fitzgerald, 59
Harris v. Pirch, 60
Hazen v. Strong, 12
Heard v. Payne, 13
Higgs v. Wilson, 45
Hirabayashi v. United States, 2
Holbolth v. Greenway, 71
Holland v. Parker, 50
Hollon v. Mathis Indep. School Dist., 70
Holman v. Wheeler, 56
Holt v. Shelton, 70
Hopkins v. Hamden Bd. of Educ., 71
Houston v. Prosser, 69
Hughes v. United States, 52
Hunter v. Erickson, 1
Hymes v. Harnett County Bd. of Educ., 36

Indiana High School Athletic Ass'n v. Raike, 70
Infant Doe v. Bloomington Hosp., 56
Irving Indep. School Dist. v. Tatro, 31, 32, 34, 37, 38
Itz v. Penick, 12

Jacobson v. Massachusetts, 12
Jensen v. Conrad, 62
Jensen v. Lick, 45
Johnson v. Walton, 45
Jones v. McKenzie, 48, 49

Kane v. Fair, 45
Kibbe v. City of Springfield, 64
King v. McMickens, 47
Kissick v. Garland Indep. School Dist., 70
Kleid v. Board of Educ., 13
Kolbeck v. Kramer, 13
Korematsu v. United States, 1
Krolick v. Lowery, 48

LaBelle v. County of St. Lawrence, 59
Landeros v. Flood, 61
Loving v. Virginia, 70

McCartney v. Austin, 12
McDonell v. Hunter, 47
McDonald v. State, 59
McKenzie v. Jefferson, 32
McLeod v. State *ex rel.* Colmer, 68
Mannis v. Arkansas *ex rel.* Dewitt School Dist., 12
Martin, *In re*, 48
Mathews v. De Castro, 2
Medeiros v. Kiyosaki, 71
Max M. v. Illinois State Bd. of Educ., 31, 32
Mercer v. Michigan State Bd. of Educ., 71
Miller v. Grand Haven Bd. of Educ., 56
Mississippi Univ. for Women v. Hogan, 2
Monahan v. Nebraska, 39

Moran v. School Dist. No. 7, Yellowstone County, 70
Morris v. Columbus, 12
Mosier v. Barren County Bd. of Health, 12
Mountain Lakes Bd. of Educ. v. Maas, 12
Murray v. Haldeman, 46

New Jersey v. T.L.O., 41, 43, 44
New York Ass'n for Retarded Children, Inc. v. Carey, 25
Nutt v. Board of Educ., 68

O'Brien v. Township High School Dist. 214, 35
O'Neil v. Dent, 68
Odenheim v. Carlstadt-East Rutherford Regional School Dist., 51, 52
Ordway v. Hargraves, 69
Orr v. Kuhlman, 45

Papacoda v. Connecticut, 33
Patchogue-Medford Congress of Teachers v. Board of Educ., 48
People v. Ekerold, 12
People v. McIlwain, 12
People v. Shokunbi, 34
Peranzo v. Coughlin, 45
Perry v. Grenada Mun. Separate School Dist., 68, 69
Phyllis P. v. Superior Court, 60
Plyler v. Doe, 3, 67
Police Dep't v. Mosley, 1

Rendell-Baker v. Kohn, 62
Reynolds v. Sims, 1
Rishworth v. Moss, 34
Rivera v. State, 56
Rogers, *In re*, 68
Roe v. Ingraham, 35
Roman v. Appleby, 59
Romans v. Crenshaw, 70
Ryan White, *In re*, 22

San Antonio Indep. School Dist. v. Rodriguez, 3, 69
Schmerber v. California, 44
Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 47
Sherer v. Waier, 38
Shoemaker v. Handel, 48
Shull v. Columbus Mun. Separate School Dist., 68
Skinner v. Oklahoma, 1
Smith v. Heath, 60
Smith v. Ricci, 71, 72
Smith v. Robinson, 38
Smith v. State, 45
South Dakota v. Neville, 46
Southeastern Community College v. Davis, 5, 26
Starkey v. Board of Educ., 70
State *ex rel.* Goodwin, *In re*, 68
State v. Berker, 50
State v. Chamberlain, 68
State v. Hay, 12
State v. Locke, 50
State v. Marion County Bd. of Educ., 68
State v. Priest, 68
State v. Stevenson, 70
Sterling v. Harris, 3
Storms v. Coughlin, 45
Syska v. Montgomery County Bd. of Educ., 12

T.G. v. Board of Educ., 32
Tatro v. Texas, 37
Tokarcik v. Forest Hills School Dist., 38
Turner v. Fraternal Order of Police, 47

United States v. Agilar, 41
United States v. Biswell, 48
United States v. Carolene Prod. Co., 3

United States v. Crowder, 52
United States v. Falu, 41
United States v. Jones, 41
United States. v. Mosquera-Ramirez, 52
United States v. Shields, 45

Valent v. New Jersey State Bd. of Educ., 71
Viemeister v. White, 12
Vyse v. Lowery, 48

Weber v. Aetna Casualty and Sur. Co., 3
Wengler v. Druggists Mutual Ins. Co., 2
Winston v. Lee, 52
Wood v. Strickland, 60
Wykoff v. Resig, 45

Yorston v. Pennell, 34

Zucht v. King, 12